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Supreme Court of the United States

October Term, 1998

DR. MARVIN FRANDSEN,

Petitioner

v.

STATE OF FLORIDA,

On Petition For Writ Of Certiorari
To The Fifth District Court of Appeals
for the State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To put the Questions Presented into perspective, Petitioner was conducting a political and religious demonstration/dramatization while nude and in a public park, and was charged with violating the Brevard County Anti-Nudity Ordinance, which prohibits public nudity with several exemptions regarding freedom of speech, expression, and religion. The Ordinance is patterned after a model anti-nudity ordinance used by local governments nationwide.

(1) Whether a criminal ordinance prohibiting certain public nudity is unconstitutional as overbroad and vague where the ordinance requires citizens and law enforcement officers to interpret whether the nudity is "bona fide", "genuine", and "incidental to and necessary for" the speech, and whether the speech "exploits" nudity "for profit or commercial gain", and where the ordinance refers to "existing judicial decisions" in defining the parameters of its regulation of speech.

(2) Whether an ordinance prohibiting nudity in places of religious worship is facially unconstitutional as violative of the free exercise clause.

(3) Whether the state has the burden of proof when prosecuting nudity under a criminal ordinance when the ordinance purports to define what nudity is constitutionally protected expression and the defense of constitutionally protected expression is raised.

(4) Whether Petitioner's nudity in a public park is protected as expressive conduct under the First and Fourteenth Amendments.

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OPINIONS BELOW

The opinions of the Fifth District Court of Appeals of Florida, the Eighteenth Judicial Circuit Court of Appeals of Florida, and the County Court of Brevard County, Florida, are unreported but are included in the Appendix to this Petition at A. 30-43. (The Appendix is abbreviated as A.)

JURISDICTION

The order sought to be reviewed was entered on January 25, 1999. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Brevard County Ordinance 95-21 (Full text at A. 9).

STATEMENT OF THE CASE

On September 7, 1995, the President of Central Florida Naturists (CFN) faxed a letter to the Brevard County Sheriff explaining that CFN members would conduct a political/religious demonstration at the Canaveral National Seashore to protest Brevard County's anti-nudity ordinance. (A. 21.) The demonstration was titled the "N.U.D.E. Protest", where N.U.D.E. stands for "Naturists Unyielding Demand Equality." (A. 21.) The letter also explained the methods and several messages of this demonstration. (A. 21-23.)

On September 9, 1995, Petitioner Dr. Frandsen participated in the N.U.D.E. organized demonstration at Playalinda Beach within an area officially indicated by the National Park Service by signage as being an area where visitors could expect to encounter nudity. (A. 41; Video.) Playalinda Beach is a part of the Canaveral National Seashore, a public park which is administered by the National Park Service. Brevard County Sheriff's Deputies, deployed in high-powered, paramilitary all terrain vehicles, converged on the protesters and arrested Dr. Frandsen for violating Brevard County Ordinance 95-21 ("the Ordinance"). (A. 42; Video.)

At the time of his arrest, Dr. Frandsen wore no clothing or other covering over his breasts, buttocks, or genitals; i.e., he was nude. (A. 43; Video.) He carried a sign stating "ANTI-BIGOTRY THE COUNTY COMMISSION'S NEW CLOTHES" and "Naturists Unyielding Demand Equality!" on the front of the sign, and "N.U.D.E." on the back of the sign. (A. 44; Video.) Dr. Frandsen also wore an arm band prominently displaying two peace signs, which he believed to be internationally recognized symbols of protest, the initials "N.U.D.E." and in smaller letters, "Naturists Unyielding Demand Equality." (A. 44; Video.) He also wore a hat emblazoned with a peace sign and the messages "N.U.D.E.," "Naturists Unyielding Demand Equality," and "C.F.N. Project Isaiah." (A. 44; Video.) During the demonstration, Dr. Frandsen theatrically performed as the Biblical prophet Isaiah as a counterpoint to the fundamentalist "crusade" that typifies much of the support for the anti-nudity Ordinance. (A. 46.) When deputies began to cite one of Dr. Frandsen's fellow demonstrators, Brian Morris, Dr. Frandsen loudly and clearly continued his performance as prophet Isaiah denouncing the Ordinance. (A. 42-43; Video.) Shortly after Dr. Frandsen began this speech, deputies ceased observing the demonstration and ceased citing the less vocal Morris; instead, they concentrated their attentions on Dr. Frandsen, ordering him to dress and citing him for violating the Ordinance. (A. 43; Video.) Also, two other less vocal nude demonstrators accompanying Dr. Frandsen were not cited. (Video.)

Evidence adduced at the motion hearing was that Dr. Frandsen's nudity was part of and necessary for the conveyance of several

particularized messages. (A. 45-46.) Dr. Frandsen rehearsed his dramatization/demonstration before an audience, and the audience confirmed his belief that the nudity was an integral and necessary part of his message. (A. 46-48.) Dr. Frandsen's portrayal of the nude Emperor communicated the idea of a lack of virtue and intelligence in politicians who support anti-nudity legislation. (A. 46.) Dr. Frandsen's nudity also communicated the message that N.U.D.E. naturists were very serious in their commitment to demanding equality. (A. 21-23, 44, 61; Video.) Dr. Frandsen's nudity as a part of "C.F.N. Project Isaiah" and his verbal speech concerning the wickedness of the threatened arrest of his fellow demonstrator theatrically placed Dr. Frandsen in the role of the nude Prophet Isaiah in preaching political repentance to a politically wicked generation. (A. 46; Video.) Dr. Frandsen's nudity as a part of "C.F.N. Project Isaiah" also constituted a theatrical illustration of the harmless, positive, and expressive value of the nude human body. (A. 46.) Dr. Frandsen also believed that his nudity was necessary to convey his messages and that it would send the wrong message to omit the nudity; and, thus, that his demonstration would not contravene the findings and intent of the Ordinance, (A. 49), or run afoul of any reasonable restrictions regarding the time, place, and manner of his speech. (A. 54.)

Dr. Frandsen has a Ph.D. in Experimental Physics, University of Illinois, 1988. (A. 39.) At all times relevant, Dr. Frandsen was and is employed by the United States Air Force at the Air Force Technical Applications Center, Patrick Air Force Base, Florida. (A. 39.) He is a top-security analyst of the electro-magnetic pulse phenomena associated with nuclear weapons, some of which are delivered by intercontinental ballistic missiles. (T. 39.) In essence, Dr. Frandsen is a species of rocket scientist and is a person of above average intelligence. (A. 48.) His job is to ensure that foreign nuclear powers are in compliance with non-proliferation treaty requirements, and, as such, he is familiar with reading highly technical legal documents. (T. 39.) Prior to his demonstration, Dr. Frandsen carefully read the Ordinance and researched case law in order to be in compliance with the Ordinance. (A. 46-47.) Dr. Frandsen, a person extraordinarily committed to the defense of the United States and to the First Amendment, (A. 39-40, 24), had a good-faith belief that his protest was constitutional and exempt under the Ordinance. (T. 49.) At no time relevant was Dr. Frandsen engaged in paid or commercial speech.

Petitioner was charged with a criminal violation of Brevard County Ordinance 95-21. In the court of first instance (County Court of Brevard County), Petitioner raised the federal questions sought to be reviewed here in a pre-trial Motion to Dismiss. The federal questions were raised in written memoranda, in the evidence presented, and in oral argument during an evidentiary hearing on the motion. See, e.g., (A. 25-60.) The county

court passed on all federal questions presented here by denying the motion, and by accepting a plea of nolo contendre while preserving the federal questions for appeal:

> The Court finds that Brevard County Ordinance 95-21, which prohibits nudity in Brevard County, is constitutional both on its face and as applied to the Defendant. The ordinance is not unconstitutionally vague or overbroad. The ordinance does not violate the Defendant's rights under the First Amendment or Fourteenth Amendment of the Constitution. More specifically, the conduct of the Defendant is not protected as free speech, political protest or freedom of religion; the ordinance does not act as a prior restraint and the enforcement of the ordinance is not in violation of the Defendant's due process or equal protection rights. Further, the Defendant's conduct is not protected under any exemption contained within the ordinance. The Court relies on its review of all case law submitted, but especially on the cases of Barnes vs. Glen Theatre, Inc., 501 U.S. 560 (1991); United States vs. O'Brien, 391 U.S. 367 (1967) and Cafe 207, Inc. vs. St. John's County, 856 F. Supp. 641 (M.D. Fla. 1994), aff'd, 66 F.3d 272 (11th Cir. 1995), cert. den., 116 S. Ct. 1544, 134 L. Ed. 2d 647 (1996) as well as prior rulings from Brevard County Court Judges.... It is therefore, ORDERED and ADJUDGED that Defendant's Amended Motion to Dismiss for Unconstitutionality, Both Facially and as Applied, and for Vagueness and Overbreadth, is hereby DENIED on all grounds.

County Court Order, at A. 7.

All federal questions raised in the County Court were presented to the Eighteenth Judicial Circuit Court of Appeals through written memoranda, record evidence, and oral argument. The Circuit Court of Appeals, provided with all the evidence presented to the County Court, passed on the federal questions by affirming the County Court:

> [A]ppellant contends that the subject Ordinance is unconstitutional, both facially and as applied in this case, and for vagueness and overbreadth. Further, and in the alternative, the appellant argues that his conduct was exempted from the prohibitions of the ordinance under sections 6(b) and (c) of the ordinance. The Trial Court denied the appellant's motion. Thereafter, the appellant pled nolo contendere to the violation, expressly reserving his right to appeal the denial of his motion. This Court has

> completed a de novo review of the record, including the video tape presented to the trial court in support of the appellant's motion.

Circuit Court of Appeals Order, at A. 2.

All of the federal questions raised in the lower courts were raised in Dr. Frandsen's Questions Presented and elsewhere in his petition for a writ of certiorari to the Fifth District Court of Appeal. Also, The ACLU of Florida recognized the importance of this case and filed an amicus brief in support of Dr. Frandsen's position. The Fifth District Court of Appeal denied the petition without opinion. (A. 1.)

ARGUMENT

I. THE CHILLING EFFECT OF THE ANTI-NUDITY ORDINANCE HAS A BROAD NATIONWIDE IMPACT.

The chilling effect of this ordinance and its counterparts in many other jurisdictions have a nationwide impact. This case relegates expressive nudity in the context of political and religious speech to somewhere outside the outer limits of protection afforded to expressive nudity associated with nude barroom dancing. The Brevard County ordinance was created and promulgated by the National Family Legal Foundation of Phoenix, Arizona, a religious right organization which has touted its goal of 1000 such ordinances in place by the year 2000. In response to a recent question from undersigned Counsel, the National Family Legal Foundation estimates that its model anti-nudity ordinance is now the law in 500-600 local jurisdictions nationwide. Thus, this case sets precedent for what will and will not be protected in a substantial and increasing portion of the United States.

Additionally, the effective banning of nudity outside of the commercial setting silences an entire category of speech. Examples include non-naturist speech such as the classical Lady Godiva protest, "nude performances in outdoor arenas, or disrobing in public to protest the exploitation of females." City of Portland v. Gatewood 708 P.2d 615, 618 (Or.App. 1985). Another world-famous example is PETA (People for the Ethical Treatment of Animals) who protest with the slogan "I'd rather be naked than wear fur" while appearing nude with signs and banners.

Moreover, this ordinance silences an entire category of speech about the meaning, value, and use of the human body. The debate about the human body, its sexuality or lack thereof, and the body's political and social meaning becomes classically one-sided because Naturists and similarly-minded persons cannot effectively communicate their messages of body acceptance, body shame, and the politics of the body to the public.

Meanwhile the opponents of body acceptance are free to express their ideas in demonstrations and dramatizations regarding the virtues of modesty and shame while dressed in whatever way best suits their message. "[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992). Here, non-sexual and natural nudity as a part of naturist drama, protest and festivals is essential to communicating this message and changing the fabric of society. All of these messages are effectively banned under the Brevard County ordinance and similar ordinances throughout an increasingly larger portion of the United States.

II. IMPORTANT FIRST AMENDMENT QUESTIONS IN THIS CASE HAVE BEEN DECIDED BY THE LOWER COURTS IN WAYS THAT CONFLICT WITH DECISIONS OF THIS COURT.

Regarding the closely related First Amendment issues in this case, the Florida court of last resort and the lower courts in this case have decided important First Amendment questions in ways that conflict with myriad relevant decisions of this Court.

A. The lower courts' decisions conflict with binding law that defines and affords First Amendment protection to expressive nudity.

As a threshold matter, the law is clear that nudity is afforded First Amendment protection when combined with protected speech and where the nudity conveys a message that is likely to be understood by those who view it. See, e.g., Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (holding that message need not even be particularized); Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 409 (1974); see also People v. Craft, 509 N.Y.S.2d 1005 (N.Y. City Ct. 1986) (finding women who bared their breasts to protest an anti-nudity ordinance engaged in expressive conduct), rev'd on other grounds, 564 N.Y.S.2d 695 (1991). Here, Dr. Frandsen's nudity conveyed the same sort of message as that conveyed in Craft, plus more, and Exemptions 6(B) and 6(C) of the Ordinance, plus binding case law, should have provided Dr. Frandsen with a "safe harbor" for his expressive nudity.

However, the lower courts ignored law that determines whether the nudity itself is sufficiently imbued with expressive content. Also, the lower courts refused to apply the established law that the government may not

prescribe the means, method, or mode by which a communication is delivered. That is a choice that only the speaker has a right to make. The right to communicate inherently includes the right to communicate effectively. For example, one may wear a jacket stating "Fuck the Draft," and the government may not require the speaker to express his political message in more socially conventional terms. See Cohen v. California, 403 U.S. 15 (1971). Here, substantial and credible evidence was adduced to prove more than the minimal communicative power required of Dr. Frandsen's nudity. (T. 22-23.) The lower courts ignore that a demonstration/performance has a "unitary integrity that cannot be hacked into pieces to arbitrarily say that parts of it are not speech." See Southeastern Promotions v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971). "The mere existence of an alternative means of expression ... cannot by itself justify a restraint on some particular means that the speaker finds more effective." Reeves v. McConn, 631 F.2d 377, 382 (5th Cir. 1980). The First Amendment protects the right not only to advocate a cause but also to select what is believed to be the most effective means for so doing. See Meyer v. Grant, 486 U.S. 414 (1988). Here, Dr. Frandsen's nudity was combined with protected speech, and thus became an integral part of that speech. While nudity, per se, may not be a constitutionally protected activity, it is protected as speech when combined with some mode of expression which itself is entitled to First Amendment protection. South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610 (11th Cir. 1984). This Court has specifically and repeatedly held that the conduct of live nudity when part of a larger communication is constitutionally protected:

> Entertainment, as well as political and ideological speech, is protected ... live entertainment, such as musical and dramatic works, falls within the First Amendment guarantee. Nor may any entertainment program be prohibited solely because it displays the nude human figure. "Nudity alone" does not place otherwise protected material outside the mantle of the First Amendment.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 64 (1981) (citations omitted); see also Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-13 (1981).

Simply put, the Exemptions in the Ordinance allow nudity that is related to free speech. The nudity that the Ordinance expressly intended to ban was nude sunbathing, which is a better example of the permissible regulation of non-speech related conduct that contains only incidental, non-

expressive communicative elements.[1] Here, Dr. Frandsen certainly combined his nudity with the other modes of protected speech/expression as integral to his religious dramatization/political demonstration.

However, the State and the lower courts ignore these holdings by deeming Dr. Frandsen's nudity to be bereft of expression. Frandsen, Case No. 97-23494-ACA at 3. The unrefuted evidence established that Dr. Frandsen's nudity was sufficiently imbued with constitutionally adequate communicative elements. Uncontroverted evidence in the trial court established that Dr. Frandsen's nudity was part of and necessary for the conveyance of several particularized messages: the nude Emperor communicated the idea of a lack of virtue and intelligence in politicians who support anti-nudity legislation (T. 22); that N.U.D.E. naturists were very serious in their commitment to demanding equality (T 22); in preaching political repentance to a politically wicked generation (T. 22); and, the harmless, positive, and expressive value of the nude human body. (T. 22.)

Furthermore, nudity that is part of a political message expressed by picketing and demonstration is even more highly protected than an entertainment play because public issue demonstrations are "an exercise of ... basic constitutional rights in their most pristine and classic form," which "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980).

There is no doubt that nudity does not ipso facto deprive otherwise protected conduct of its First Amendment protection:

> Entertainment, as well as political and ideological speech, is protected ... live entertainment, such as musical and dramatic works, falls within the First Amendment guarantee. Nor may any entertainment program be prohibited solely because it displays the nude human figure. 'Nudity alone' does not place otherwise protected material outside the mantle of the First Amendment.

Schad, 452 U.S. at 65.

> Furthermore, attempts to ban nudity from a communication are unconstitutional as attempts to regulate the content of a communication itself, a forbidden attempt because "government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Erznoznik, 422 U.S. at 215. The nature of theatrical performances, such as that engaged in by Dr. Frandsen at the time of his arrest, enjoys First Amendment

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[1] A better, but still imperfect, example. Dr. Frandsen, of course, strongly advocates that nude sunbathing be legislated or adjudged legal in Brevard County.

protection that takes into account the expressive conduct necessary for dramatic expression: "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature ... a musical play must be deemed a unitary form of constitutionally protected expression." Southeastern Promotions v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971). This doctrine was reinforced by this Court in stating that the attempt to censor live nudity from a play was: "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of the Court's decisions." Southeastern Promotions v. Conrad, 420 U.S. 546 (1975).

Here, Dr. Frandsen's performance as nude Isaiah and the nude emperor communicated the idea of a lack of virtue and intelligence in politicians who support anti-nudity legislation. Dr. Frandsen reasonably believed that his nudity was not marginal but essential and central to the messages he was trying to express, and that he could not properly, realistically, effectively, or credibly portray an historically nude prophet or emperor while wearing pants, or express the bareness of a politician's virtue and intelligence if he were not truly bare. Dr. Frandsen sincerely and reasonably believed that his nudity was necessary to convey his messages and that it would be hypocritical to omit the nudity. (T. 25, 33.) Finally, Dr. Frandsen rehearsed his dramatization/ demonstration before an audience, and the audience confirmed his belief that the nudity was an integral and necessary part of his message. (T. 22-23.) Dr. Frandsen went well beyond that which is constitutionally required to ensure that his nudity would be expressive conduct, sufficiently imbued with communicative elements to fall within the protection of the First and Fourteenth Amendments because the unrefuted facts presented to the trial court show that Dr. Frandsen intended to convey a message and the likelihood was great that the message would be understood by those who viewed it. (T. 22-23.)

The Circuit Court of Appeals holds throughout that the trial court's finding is a matter of law, not a finding of fact, but contradicts itself when it admits that facts existed and were apparent that might have led to a different outcome in the hands of a jury. (T. 22-23.)

Furthermore, the lower courts appear to afford less protection to nudity in the context of serious political and religious themes than to nudity in the context of erotic entertainment. (A. 4 (invoking Barnes v. Glen Theatre and St. Johns County v. Cafe 207.)) However, those decisions expressly referred to the place of

political speech at the core of First Amendment protection. Thus, the lower courts either misstated or failed to apply established law to the facts concerning Dr. Frandsen's fundamental rights, and certiorari review is proper.

B. The lower courts misstate and ignore rules of law in allowing the ordinance to require citizens and law enforcement officers to interpret qualifiers of whether the nudity is "bona fide", "genuine", "incidental to and necessary for" the speech.

Certiorari should be granted because the Ordinance's qualifiers and the lower courts' interpretation thereof ignore the certainty required of laws that regulate speech, and fail to give adequate guidance to lower courts and law enforcement:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is . . . whether the Rule is so imprecise that discriminatory enforcement is a real possibility.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991). Here, the danger is present because Dr. Frandsen's expressive nudity was a direct and explicit challenge to the Ordinance itself and the government's policy toward public nudity and suppression of certain viewpoints about public nudity, and "[w]here a legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352, 358 (1983). Here, law enforcement officers were able to arrest Dr. Frandsen under the vague and overbroad qualifiers of the Ordinance, not only because he was the most expressive demonstrator, but because he was engaged in political protest in support for nudity and nude sunbathing and in opposition to the actions of the Brevard County government -- all particularly controversial issues in Brevard County.

The lower courts ignored the binding First Amendment jurisprudence that prohibits subjective interpretations of the Ordinances's vague and overbroad qualifiers that were invidious to Dr. Frandsen.

The first qualifier of "bona fide" in §6(b) is unconstitutionally vague. Webster's New World Dictionary, 3d College Edition (1988) defines "bona fide" as "in good faith, without dishonesty, fraud or deceit." Likewise, the Third District Court of Appeal has said the definition of "bona fide" is "in good faith." Matheson v. Elcook, 173 So. 2d 164, 166 (Fla. 3d DCA 1965). No standards are given to ordinary persons or to law enforcement as to how to determine if a nude communication is false or bona fide. As a result, police and courts must determine the "bona fideness" of a communication on an ad hoc basis. The Florida Supreme Court condemned as vague the use of "bona fide" or some similar qualifier because it leaves "to police the unguided task of differentiating ... acts reflecting the state of mind needed to make an arrest." Wyche v. State, 619 So. 2d 231 (Fla. 1993); see also Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). The standard of an improper motive rather than an improper act is also unconstitutionally overbroad. Outside of defamatory falsehoods with knowledge of the falsity, any imposition of a "motive" test for determining the worthiness of First Amendment protection is considered overbroad, because "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).

The Ordinance's requirement in §6(b) that nudity must be "incidental to and necessary for" the communication is also vague and overbroad. The term "incidental" is the opposite of "necessary for," particularly as typically used in First Amendment jurisprudence. For instance, United States v. O'Brien, 391 U.S. 367, 377 (1968), holds that a law is constitutional "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." "Incidental" is defined as "occurring or likely to occur as an unpredictable or minor concomitant; of a minor, casual, or subordinate nature." Random House Unabridged dictionary, (1986). Deeming expressive nudity to be "incidental to" as a minor concomitant the protected speech is alone subject to impermissible discrimination based on the viewpoint of whether nudity is important or minor. "Necessary," rather contrarily, is defined as "absolutely essential; indispensable; needed to achieve a certain result or effect; requisite; unavoidably determined by prior conditions or circumstances; inevitable; required by obligation, compulsion, or convention." Id. The denotations and connotations of dispensability and extraneousness of "incidental to" would be contrary to the

denotations and connotations of indispensability and criticality of "necessary for" to anyone other than perhaps an extremely adroit rhetorician or semanticist. The effect of the regulation must be incidental, not the relationship of the expressive conduct to the message. As used in the Ordinance, "incidental to" and "necessary for" are much better suited as antonyms than as complimentary qualifiers in a criminal statute for people of average intelligence.

Furthermore, the Ordinance's requirement that the government judge the nudity to be "necessary" to the communication violates the clear constitutional standard that it is the right of the speaker alone to choose how to present a message. The government is explicitly prohibited from judging what is "necessary" to a message. Such content control is forbidden as substantially overbroad by the First Amendment as discussed above. This substantial overbreadth renders the phrase "and necessary" facially unconstitutional. Broadrick v. Oklahoma, 413 U.S. 601 (1973). Here, the County adduced no evidence to refute Petitioner's evidence that the nudity was necessary and a major component to his message. In fact, the County's position is essentially that nudity can never be necessary to or a major component of a political or religious communication, thereby making the Exemptions nullities and the Ordinance unconstitutional. However, the lower courts ignored this issue.

In addition, the Ordinance's requirements in §6(b) that a message must be "genuine" and "not a guise or pretense" are both unconstitutionally vague and overbroad. Nowhere in the Ordinance is the definition of a "genuine" as opposed to a "non-genuine" message provided for the benefit of the person of ordinary intelligence who must wonder whether the government will judge a particular communication made with a cynical, sarcastic or insincere attitude as "genuine" enough to merit protection. Apparently some live nude communications are "genuine" and not a "guise or pretense" and some are not, but no criteria are provided within the Ordinance to differentiate the two.

Furthermore, the requirement that the government determine the "genuineness" of a message or the presence of some "guise or pretense" is blatant motive-reading and viewpoint discrimination. Genuine as well as non-genuine messages are still messages and still receive the full protection of the U.S. Constitution. As discussed above in the section regarding "bona fide," the presence or absence of sincerity of a speaker is simply not a valid requirement under the Constitution, and "no test of truth--especially one that puts the burden of proof on the speaker--can be tolerated."

New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964). This, of course, is another example of the Exemptions going far beyond the constitutional parameters of expressive con-duct, thus creating a statute that regulates speech. Therefore, certiorari should be granted because of the First Amendment precepts that are rather blatantly ignored by the lower courts in this case.

C. The lower courts misstate rules of law in allowing the Ordinance to require citizens and law enforcement officers to interpret whether the speech "exploits" nudity "for profit or commercial gain."

Certiorari should be granted because the lower courts in this case misstate and ignore the facial invalidity of the Ordinance's proscriptions regarding for-profit speech. The Ordinance's clause in §6(b) that a message must not be utilized for "exploitation for profit or commercial gain" is both vague and overbroad. Such a stricture is antithetical to First Amendment jurisprudence. A law enforcement officer on the scene is given no guidance whatsoever as to how to determine whether a live nude communicator is being paid and thus prosecutable for his or her "guise or pretense" to "exploit" nudity. No threshold amount of money is determined to constitute the "profit or commercial gain" necessary to establish a "guise or pretense." The value judgment of "exploitation" cannot be made and the arbiter of value, popularity, or social utility of the particular live communication cannot be named. The criteria are standardless, and a clause such as this is unconstitutional on its face because "it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." Kolender, 461 U.S. at 361; see also Coates, 402 U.S. at 615 (banning statutes with an "unascertainable standard").

Determinations of "exploitation," as well as "bona fide", "genuine", "guise or pretense," all can depend on future contexts which define the status of these words; e.g., if a nude actor donates the profits to buy clothing for the homeless versus purchasing a luxury car, the communication may or may not be bona fide, genuine, a guise or pretense, or an exploitation.

Additionally, the phrase "exploitation for profit or commercial gain" is substantially overbroad because the Ordinance makes no distinction between for-profit speech and commercial speech. The Ordinance treats all for-profit speech (speech which is compensated) as commercial speech (speech which proposes a commercial transaction). Yet the two categories of speech

(for-profit and commercial) are constitutionally distinct. This vagueness and confusion concerning the First Amendment is impermissible because it bans constitutionally protected for-profit speech. The simple addition of money to speech in no way reduces the constitutional protection for that speech. See, e.g., Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (holding that "First Amendment claims could not be dismissed merely by urging ... that the individual who leads it in exercising these rights receives compensation for doing so"); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (holding that the degree of such First Amendment protection is not diminished merely because the newspaper or other speech in question is sold rather than given away). As stated by the Fourth Circuit, "Live entertainment is protected speech ... the law draws no distinction between expression which generates a profit and expression which does not." Davenport v. City of Alexandria, 710 F.2d 148, 150 n. 6 (4th Cir. 1983); see also Bery v. City of New York, 97 F.3d 689, 695-96 (2d Cir. 1996) (holding that the sale of protected materials is also protected). Because the Ordinance bans protected for-profit speech based upon content, the Ordinance is substantially overbroad.

In addition, the phrase "exploitation for profit or commercial gain" is substantially overbroad because the Ordinance has confused the constitutional limits set on adult entertainment per se or nudity acting as a sales promotion (not a part of speech) in saloons, with nudity as a part of a commercial message that is not of the above categories. Exemption 6(b) blatantly engages in selective content control, which is the essence of impermissible censorship and substantial overbreadth. See Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (holding that restrictions on commercial speech are valid only if "they are justified without reference to the content of the regulated speech"); Edenfield v. Fane, 507 U.S. 761 (1993) (holding that even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment).

Moreover, the term "genuine" as a qualifier and the phrases "guise or pretense" and "exploitation for profit or commercial gain" are also substantially overbroad because the Ordinance focuses solely on the speaker's state of mental sincerity or financial affairs while denying the right of audience members to hear and see the message. The constitutional right of the audience exists independently of and regardless of the speaker's state of mental sincerity or financial affairs. See Martin v. Struthers, 319 U.S. 141

(1943) (holding that "[t]his freedom embraces the right to distribute literature ... and necessarily protects the right to receive it."); Board of Education v. Pico, 457 U.S. 853 (1982) (holding that the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech); Edenfield, 507 U.S. at 767 (holding that "the speaker and the audience, not the government, assess the value of the information presented"). Thus, certiorari should be granted because of the insidious chilling effect of this ubiquitous Ordinance.

D. The lower courts misstate rules of law in allowing the Ordinance to refer to "existing judicial decisions" in defining the parameters of its regulation of speech.

Certiorari should be granted because the lower courts ignore law that would invalidate Exemption 6(c) as facially unconstitutional for vagueness and overbreadth because Exemption 6(c) purports to exempt from prosecution public nudity that is protected by "existing judicial decisions." However, the Ordinance fails to explain what those exemptions are. When the person of ordinary intelligence, including a law enforcement officer, refers to such case law, he or she may see no existing judicial decisions that specifically or expressly apply to that person's circumstances. Additionally, no other resources whatsoever are provided to determine the meaning of this exemption.

In addition, Exemption 6(c) is void for vagueness because a person of ordinary intelligence cannot understand the meaning of Exemption 6(c). A statute must provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Court has forbidden any language in a penal statute that forces a citizen to guess at its meaning: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Hynes v. Mayor & Council of the Borough of Oradell, 425 U.S. 610, 620 (1976). Here, referring an ordinary citizen to unknown, unstated, and unreferenced case law of which only a lawyer might be aware, the meaning of which often causes even judges of the first water to disagree, forces a person of ordinary intelligence to guess at the Ordinance's

meaning. Regarding the immunity of a park management professional who arrested a nude protester only to have the charges dismissed, "A public official certainly cannot be expected to be more knowledgeable than the courts with regard to the complexities of constitutional law." Naturist Society v. Fillyaw, 858 F. Supp. 1559, 1571 (S.D. Fla. 1994). Similarly, public officials "are not appellate judges, able to parse the many opinions of the state and federal courts on the subject ... Neither, however, does the law impose on them the burden to do so." DeWald v. Wyner, 674 So. 2d 836, 840 (Fla. 4th DCA 1996). If a public official cannot be held to such a standard, then exemption 6(c) cannot possibly hold the general public to such an extreme standard of knowledge and expertise in determining what may or may not or has or has not been upheld in the courts as protected expression.

Exemption 6(c) also fails the constitutional requirement that all meanings of a statute must be stated exactly in the text of the statute itself. As noted above, exemption 6(c) states nothing on its own but declares its exempting powers relative only to unspecified existing case law. In criminal statutes, "Nothing is to be regarded within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words." State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977).

Additional vagueness in the term "existing judicial decisions" is that the term "existing" is not limited by time or by geography. The Ordinance never defines the time frame of the term "existing." The Ordinance does not specify where or when the "existing" judicial decision must exist in order to apply to the Ordinance's terms.

Also, certiorari should be granted because Exemption 6(c) requires legislation through adjudication and judicial determination, which is unconstitutional for both vagueness and overbreadth. Exemption 6(c) seeks to shape the contours of the Ordinance to instantly conform to judicial case law "A series of adjudications limiting the application of the Ordinance would be unacceptable because it would result in a chilling effect on protected speech during the pendency of judicial proceedings delineating the contours of the ordinance." Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993) (citing Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987)). The First Amendment is offended by the process of delineation of First Amendment contours via "piecemeal adjudication" because the result is "quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment Freedoms," Baggett v. Bullitt, 377

U.S. 360, 379 (1964), and because "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal." Dombrowski v. Pfister, 380 U.S. 479, 491 (1965). Furthermore, "a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues." Id. at 489. Piecemeal prosecutions also justify overbreadth challenges in First Amendment cases because:

> If the rule were otherwise, the contours of a regulation would have to be hammered out case by case -- and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation ... The chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure.

Id. at 486.

Also, the mere possibility that a statute will ensnare protected as well as unprotected speech may be sufficient to invalidate the statute. Moreover, "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Baggett, 377 U.S. at 373. Thus, certiorari should be granted because Exemption 6(c) is in conflict with established First Amendment jurisprudence regarding vagueness and overbreadth due to the Ordinance's need for definition by the courts and its lack of guidance for the courts, law enforcement officers, and people of average intelligence.

In addition, certiorari should be granted because Exemption 6(c)'s need for explanation through judicial definition of exempted conduct is an improper delegation of powers "A vague law is not rendered more precise by virtue of a court having passed upon its application to particular facts. Rather, such a process merely shifts the exercise of impermissibly broad discretion from executive officials to judges, a shift that has no significance in First Amendment jurisprudence." Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1548 (11th Cir. 1993). Exemption 6(c) attempts to use a method forbidden over 30 years ago when the Court ruled that "judicial safeguards do not neutralize the vice of a vague law under the First Amendment." Baggett, 377 U.S. at 373. Thus, the County legislature must define the Ordinance much more precisely than it does in 6(c), and may not leave that duty to the courts. Therefore, certiorari should be granted because the Florida

courts have ignored binding First Amendment jurisprudence regarding vagueness in this case.

E. The lower courts ignore the Free Exercise clause in allowing the Ordinance to prohibit nudity in places of religious worship.

Certiorari should be granted because the lower courts ignore that the Ordinance is impermissibly and substantially overbroad and it conflicts with binding First Amendment jurisprudence regarding freedom of religion. The ban on nudity in the Ordinance's Section 5 applies to all "public places," which are broadly defined in §4(e) to include a "meeting facility utilized by a religious ... or similar organization." The term "meeting facility" is broad and on its face must include private homes where religious services are held as well as a facility owned by a religious congregation. No exemptions exist even for religious facilities or religious meetings held in homes in any of the terms defined in §4 or in the exemptions listed in §6.

Whether or not held in homes, the Ordinance effectively bans several religions from practicing inside of Brevard County. These religions include christians wishing to practice nude baptism as was mandatory in early Christianity; Native American religions practicing nudity in sweat lodge ceremonies; Mormons, who practice one essential temple ritual while nude; Pagan groups practicing nudity in their rites; and the Church of the Natural Way, which engages in nude rites in private homes and backyards that serve as meeting places.

In contrast to the complete ban on religious nudity, the Ordinance allows secular nudity for recreation or other purposes in §4(d), §4(d)(1-2), and §6(a), §6(d) and §6(f). Secular nudity exemptions include private nudist clubs, areas designated for recreation by the State or Federal governments, public showers and locker rooms, and doctors offices.

Any regulation of religion is subject to strict scrutiny. Church of Scientology, 2 F.3d at 1519. Moreover:

> [I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason. [The government's] application of the ordinance's test of necessity devalues religious reasons * * * by judging them to be of

> lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Church of the Lukumi Babalu Aye, 508 U.S. at 538.

Any law that visits "gratuitous restrictions" on religious conduct de facto and de jure "suppresses the conduct because of its religious motivation." Id. Facial neutrality in this case is irrelevant because the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt ... the effect of a law in its real operation is strong evidence of its object." Id. The Eleventh Circuit has emphatically ruled that "[i]f the legislature's stated purpose is not actually furthered by the enactment," then the purpose is "insincere or a sham." Church of Scientology, 2 F.3d at 1527. Without compelling reasons to the contrary, exemptions made for secular reasons must also be made for religious reasons. See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 1999 WL 123608, *1 (3d Cir. March 3, 1999). Here, the Ordinance provides absolutely no justification for banning religious nudity while allowing many instances of secular nudity; e.g., for medical examinations. Thus, certiorari should be granted because the Ordinance is impermissibly and substantially overbroad and it conflicts with binding First Amendment jurisprudence regarding freedom of religion.

F. The lower courts misstate law holding that the state has the burden of proof in enforcing a criminal ordinance prohibiting nudity except when the nudity is part of certain types of speech as defined by the ordinance.

Certiorari should be granted because the decisions of the lower courts conflict with federal law that places the burden of proof on the state to prove the constitutionality of criminal laws that implicate rights of free speech. Besides the rule of lenity regarding construction of criminal statutes, the lower courts ignore binding First Amendment jurisprudence that the ordinance must be considered a statute that regulates speech. Exemption 6(b) purports to define the actual parameters of public nudity that is protected as speech, and Exemption 6(c) attempts to define protected public nudity as that which is protected by existing Judicial decisions. Brevard County Ordinance 95-21(6). Although the Ordinance labels its clauses that actually regulate speech as "Exemptions," describes itself as regulating conduct instead of speech, and words its

regulation of speech in the negative, it is still subject to the same standard of review and burden of proof as if it expressly and forthrightly described itself as a statute that regulates speech. Brevard County Ordinance 95-21(6). The burden is on the state to prove the constitutionality of an Ordinance regulating protected speech and related expressive conduct. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 658 (1981); Edenfield v. Fane, 507 U.S. 761 (1993); United States v. National Treasury Employees Union, 513 U.S. 454 (1995). Here, because the Ordinance directly attempts to regulate speech in Section 6 (and indirectly elsewhere), the State has the burden to prove its constitutionality. Merely labelling a clause an "exemption" will not save a law that actually regulates speech from carrying the burden of proving its constitutionality. The "Exemptions" in the Ordinance go much farther than mere exemption by attempting to qualify and define the bounds of protected speech. For many reasons, including overbreadth and vagueness as discussed above, the Ordinance misstates and overly restricts those bounds. Thus, the Exemptions are underinclusive for not exempting all public nudity that is constitutionally protected expression. Moreover, in as-applied challenges, "[w]here the transcendent value of speech is involved, due process certainly requires that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Freedman v. Maryland, 380 U.S. 51, 58 (1965). Additionally, the Ordinance qualifies as a prior restraint because it subjects certain types of speech and expressive conduct to censorship in advance of its occurrence. See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). Here, the Ordinance places a prior restraint on expressive conduct through the Ordinance's vague, indefinite, overbroad, and underinclusive qualifiers and other criteria in the Exemptions. Brevard County Ordinance 95-21(6). Prior restraints are well known to come to the Court with a "heavy presumption" against their constitutional validity. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Here, in actuality, the Ordinance attempts to regulate speech; and, thus, shifts the burden to the State to prove the constitutionality of the Ordinance. Thus, certiorari should be granted because the lower courts ignore binding First Amendment jurisprudence that the Ordinance must be considered a statute that regulates speech.

G. The lower courts ignore that criminal statutes must meet a very high standard of precision to avoid the chilling of First Amendment rights.

Certiorari should be granted because the lower courts in this case ignore that binding First Amendment jurisprudence requires that the imprecision of vagueness and overbreadth impermissibly places the burden of proof on the accused, thereby chilling the exercise of protected speech. Not only must penal statutes meet a relatively high test of specificity, but "where a statute imposes criminal penalties, the standard of certainty is higher." Kolender v. Lawson, 461 U.S. 352, 358 (1983); see also Winters v. New York, 333 U.S. 507, 514-16 (1948). Furthermore: "[s]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech, a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." Hynes v. Mayor and Council of the Borough of Oradell, 425 U.S. 610, 620 (1976). This is true because in an area of regulation affecting First Amendment rights, "precision of regulation must be the touchstone." Interstate Circuit v. Dallas, 390 U.S. 676, 682 (1968). And, this Court has long held that any statute must provide an "ascertainable standard of guilt" and that without such a clear standard the statute violates the Fourteenth Amendment. Herndon v. Lowry, 301 U.S. 242 (1937); see also Coates v. Cincinnati, 402 U.S. 611 (1971).

Uncertain laws are unconstitutional because their "uncertain meanings will inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). Citizens are coerced to steer wide, which unacceptably limits free speech because of fear of loss. Baggett v. Bullitt, 377 U.S. 360 (1964). The "existence of a penal statute susceptible of sweeping and improper application" is intolerable because the "threat of sanctions may deter First Amendment exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963). Here, because of the Ordinance's imprecision and ambiguity, the State cannot prove the constitutionality of this criminal statute's free speech regulations. Thus, certiorari should be granted because binding First Amendment jurisprudence requires that the imprecision of vagueness and overbreadth impermissibly places the burden of proof on the accused, thereby chilling the exercise of protected speech.

H. The lower courts misstate law that protects Petitioner's nudity in a public park as expressive conduct under the First Amendment.

Certiorari review is especially appropriate in this case because of the many instances where established rules of law were misstated or ignored by the courts below applicable to facts admitted and/or undisputed by the State. Here, few facts are disputed, and the undisputed facts were presented to all courts involved. The video in the record is a faithful representation of the demonstration and arrest. Other unrefuted evidence adduced at the trial level is very important here. This evidence, as preserved in the hearing transcript and presented to the appellate courts, shows that a test audience confirmed Dr. Frandsen's belief that his nudity conveyed several specific particularized messages, and that the particular messages would not be conveyed or have the same meaning without the nudity; that Dr. Frandsen is a person of superior intelligence; that Dr. Frandsen carefully read the Ordinance before his demonstration/performance in order to be in compliance with its exemptions; and, that Dr. Frandsen was not engaged in commercial speech or conduct. At no time did the trial court or the State indicate any doubts as to the credibility of such testimony -- contrarily, the trial court repeatedly stated that Dr. Frandsen, a nuclear treaty-compliance applied scientist for the United States Air Force, was presumed to be "a person of good will." (T. 15-16.) Similarly, neither the trial court nor the State disputes the seriousness of Dr. Frandsen's demonstration/presentation. (T. 28, 37.)

Also, certiorari should be granted because the lower courts failed or refused to apply the established law to the evidence of discriminatory enforcement. Discriminatory "selective" enforcement exists when one is singled out for prosecution among others who were similarly situated, and when this selection is invidious or in bad faith. Geaneas v. Willets, 911 F.2d 579, 587 (11th Cir. 1990). Here, unrefuted evidence was presented that the deputies abandoned citation of the quiescent demonstrator to arrest the more vocal Dr. Frandsen because of the content of his message and the increased likelihood that his message would be received and understood by others. Additionally, evidence was adduced to show that nude line dancing and other forms of erotic dancing (that do not challenge the Ordinance) would not be prosecuted, while nude protesters are arrested. Therefore, certiorari should be granted because the lower courts ignore the constitutional mandate that laws not be enforced in a discriminatory manner.

I. The lower courts ignored law that the park in which Dr. Frandsen demonstrated is a public forum.

Certiorari should be granted because the lower courts ignore binding First Amendment jurisprudence that exculpates Dr. Frandsen because his nude protest was conducted in a public forum. Although no blanket license exists for a person to do whatever that person wishes to do on public property, expressive nudity such as Dr. Frandsen's nudity is exempt from prosecution in the location in which Dr. Frandsen was arrested -- the public streets, parks, and beaches of the Canaveral National Seashore -- because those places are public fora. As this Court held almost sixty years ago when announcing the doctrine of public fora, public parks and streets are the quintessential public fora protected under the First Amendment:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939).

In Hague, the Court disavowed the proposition that a municipality's "essential rights ... to control its own parks and streets" includes the ability to restrict free speech to avoid social unrest or offense. Id. As the Eleventh Circuit and this Court have more recently ruled, "The First and Fourteenth Amendments ... take away from the government, state and federal, all power to restrict freedom of speech, press, and assembly where people have a right to be for such purposes." United States v. Gilbert, 920 F.2d 878 (11th Cir. 1991) (citing Cox v. Louisiana, 379 U.S. 536, 578 (1965) (Black, J., dissenting)). Moreover, the Eleventh Circuit has specifically ruled that beach parks such as Canaveral National Seashore are public fora. Naturist Society v. Fillyaw, 958 F.2d 1515, 1522-23 (11th Cir. 1992). Here, the situs of Dr. Frandsen's expressive nudity was the quintessential public forum: a public park. Id.

Here, the lower courts relied on the dictum in Adderley v. State of Florida, 305 U.S. 39 (1966), that states, "people who want

to propagandize protests or views have [no] constitutional right to do so whenever and however and wherever they please." This dictum is inapposite here for several reasons. First, the Ordinance exempts expressive nudity in a public location of the sort in which Dr. Frandsen was arrested. Second, the holding in Adderley pertained to non-public fora such as the curtilage of a jail, where public expression has no tradition of freedom, and not to a public street in a public park at a public beach which are dedicated for use as public fora. Id. at 47. The Court's holding in Adderley was premised solely on the legal fact that the petitioners were attempting to protest in an area that was not recognized by the Court to be a public forum normally available to petitioners for such demonstrations/performances. Id. The petitioners did not prevail in Adderley because the Court determined that the protestors were not in a public forum, and not because their protest was not the type of conduct normally protected under the First Amendment in a public forum. Id. Had the petitioners in Adderley demonstrated in an area traditionally considered to be a public forum, their convictions for trespass would not have been constitutionally permitted. Id. Here, Dr. Frandsen was arrested for nudity in a quintessential public forum. Thus, the lower courts misstated the law applying to public fora.

Furthermore, the lower courts are in conflict with binding First Amendment jurisprudence by allowing the State to engage in content-based discrimination by arresting Dr. Frandsen for engaging in expressive nudity in a political or religious demonstration/ performance while allowing public nudity for other, more commercial purposes, such as heavily advertised erotic barroom dancing or nude line dancing. It is well established that expressive conduct is protected speech that is subject to only content-neutral time, place, and manner restrictions, and relegation of Dr. Frandsen's content-laden expressive nudity to a place somewhere other than a public forum is an unconstitutional restriction that violates Dr. Frandsen's rights to free speech and equal protection:

> [G]overnment may not "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.

Carey, 447 U.S. 455 (1980) (citations omitted).

Thus, Dr. Frandsen has a right to express himself in the same place as everyone else who is engaged in non-obscene, non-commercial speech: "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969). Subject to the time, place and manner constraints that all speech must obey without regard to content, the government may not abridge the right to communicate in a park or in other public fora, indoors or outdoors: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. New Jersey, 308 U.S. 147, 163 (1940); see also Thornhill v. Alabama, 310 U.S. 88 (1940). In terms of format or choice of symbols and content, no essential difference exists between indoor and outdoor public fora. All forms of dramatic speech, political protest and other forms of free speech are just as protected in outdoor public fora (such as sidewalks or parks) as in indoor public fora such as specially built stages, as such activities:

> need not always be performed in buildings or even on a defined area ... nor need they be performed by professional actors "since amateur speakers no less than professionals, outdoors no less than indoors, enjoy" a constitutional right to freedom of speech, including the right openly to criticize the government during a dramatic performance.

Schact v. United States, 398 U.S. 58, 61-63 (1970) (citations omitted).

Because Dr. Frandsen's nudity was protected expression, the County cannot force him to express himself in a place other than a public forum. It is true that this Court has held that government may prohibit offensive speech as intrusive if the audience is captive and cannot avoid the objectionable speech. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). However, this restriction is not very relevant in regard to public fora. Where the innocent passersby on the public streets can simply avert their eyes to avoid the protected speech they find offensive, then government cannot prohibit that speech. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1981) (holding that nudity on a drive-in movie screen visible from a public highway was protected speech). Here, anyone walking past Petitioner could have averted their gaze if they found his nudity to be offensive. Nudity that is part of a larger communication cannot be restricted from a public

forum. Southeastern Promotions v. Conrad, 420 U.S. at 552. Thus, because Dr. Frandsen's nudity is part of the content of his speech, his speech is entitled the same content-neutral restrictions as all other protected speech. He cannot be confined to barrooms or strip joints or anywhere else outside of a public forum. He must be afforded protection equal to all other forms of nude expression currently allowed elsewhere in the United States, including public fora in Brevard County. Therefore, because Dr. Frandsen's nudity was protected as expressive conduct, Dr. Frandsen's expressive nudity was not subject to prosecution as illegal public nudity per se, but was only subject to the same content-neutral time, place, and manner restrictions as non-nude, public forum speech; and, because Dr. Frandsen was in a public forum and arrested, prosecuted, and convicted for the nude content of his speech; i.e., his protected content-rich, speech-related nudity; and not as a violation of a content-neutral time, place, and manner restriction on speech, certiorari should be granted to correct the misstatement and non-adherence of the lower courts to binding First Amendment jurisprudence.

J. The lower courts misstate the O'Brien test because Dr. Frandsen's nudity is already exempted under constitutional law; and, in any event, Dr. Frandsen's arrest did not meet the test's requirements.

Certiorari should be granted as the lower courts misstate the O'Brien test as applied to Dr. Frandsen's nudity. According to the test in United States v. O'Brien, expressive conduct can be banned if (1) the banned activity is otherwise within the constitutional power of the Government; (2) if the ban furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377. The test promulgated in O'Brien may apply to the main body of the Ordinance insofar as the Ordinance applies to conduct containing nudity that does not meet the communicative test required of expressive conduct associated with protected speech, but the Ordinance's exemptions purportedly exempt expressive nudity that was combined with other protected speech, taking the exemptions themselves out of the purview of O'Brien.

Moreover, the arrest of Dr. Frandsen does not comply with the first requirement of the O'Brien test that the banned activity is otherwise within the constitutional power of the Government. Neither O'Brien nor Cafe 207 v. St. John's County, 856 F. Supp. 641 (M.D. Fla. 1994), hold that the state can absolutely bar public nudity from all constitutional protection where that nudity is combined with otherwise protected speech. Neither decision addresses the question of nudity in the context of political protest and neither can be read as removing all First Amendment protection from Dr. Frandsen's nude political protest.

Here, the Ordinance, by its own terms, exempts public nudity that is part of a live performance, demonstration, etc. By its own terms, the Ordinance implicitly recognizes that nudity which falls under one or more of its exemptions does not run contrary to the express findings and intent of the Ordinance. See Cafe 207, 856 F. Supp. at 648 (holding that public nudity, such as theatrical performances and political demonstrations where nudity is protected as speech, would not be banned by the Ordinance). The Cafe 207 Court ruled:

> It is here that Section [6] would step in to safeguard the protected speech ... Furthermore, any court called upon to interpret and apply Section [6] exemptions would also have the guidance of the pertinent legislative findings embodied in the whereas clauses of the Ordinance. . . . [recognizing] that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by the United States or Florida constitutional provisions; and . . . the express exemption contained in Section 7(b)(ii) of this Ordinance provides adequate protection to Persons who, without such express exemption, might otherwise be prevented or discouraged by the Ordinance from exercising constitutionally protected rights.

856 F. Supp. at 648-49. This ruling is consistent with this Court's ruling that "all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." Metromedia Inc. v. San Diego, 453 U.S. 490, 525 (1981). The St. John's County ordinance was held constitutional against Cafe 207's challenge to the restrictions on commercial adult entertainment only because the ordinance purported to exempt and protect public nudity that is part of a larger communication, outside of (constitutionally peripheral) commercial adult entertainment. However, the lower courts in this

case claim Cafe 207 for the type of nudity that the federal courts exempted from the ordinance. Cafe 207 v. St. John's County, 66 F.3d 272 (11th Cir. 1995). This ruling by the Eleventh Circuit must be understood and followed by Florida courts and governments, and not be further misused to excuse the unconstitutional arrests of speakers such as Dr. Frandsen, who actually seek out and rely upon the (falsely) promised protection within the Ordinance's exemptions.

Furthermore, uncontroverted evidence was adduced in the lower court proceeding that showed that the arrest of Dr. Frandsen did not fulfill the requirements of the second prong of the O'Brien test because prohibiting Dr. Frandsen's nudity did not further a substantial governmental interest; i.e., his nudity would not create or exacerbate the negative secondary effects and other problems listed in the findings and intent clauses of the Ordinance. This Court ruled in a plurality opinion that the marginally expressive conduct of commercial erotic dancing that is generally associated with the secondary effects of nudity, such as public masturbation, prostitution, sexual assault, or other crimes, can be adequately restricted by statute. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). However, Justice Souter's concurrence in Barnes also noted with approval the statement from Young v. American Mini Theatre, Inc., 427 U.S. 50, 70 (1976), stating that "society's interest in protecting expression like commercial erotic dancing is of a wholly different, and lesser, magnitude than the interest in protecting political speech." Id. at 523. Justice Souter went on to state: "the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in Renton...."
Id. at 523 n. 2. Justice Souter also emphasized: "I reach this conclusion again mindful, as was the Court in Renton, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression."
Id. at 524. Thus, the controlling opinion in Barnes regarding nudity when the nudity is part of a political message is identical to the holding in Boos v. Barry, 485 U.S. 312 (1988), where the Court stated that its support of the Renton Ordinance was "aimed at the secondary effects of such theaters in the surrounding community," effects that are almost unique to theaters featuring sexually explicit films; i.e., prevention of crime, maintenance of property values, and protection of residential neighborhoods. Id. at 320. However, in all other areas of nudity combined with speech "we have indicated that

in public debate our own citizens must tolerate insulting, even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." Id. at 322. This means that Barnes applied specifically to sexual-content nudity, which is very different from political-content nudity in the Court's eyes. Id. Barnes has done nothing to change this established First Amendment law, where political speech such as that engaged in by Dr. Frandsen is concerned. Thus, although Dr. Frandsen's nude political protest may upset some people (although no evidence was presented that such was the case), it clearly does not exacerbate negative secondary effects or any of the other evils that the Ordinance associates with nudity, and is, therefore, exempted under O'Brien.

Dr. Frandsen's arrest and conviction also fail the third prong of the O'Brien test, which requires that the governmental interest be unrelated to the suppression of free expression. The actual arrest of Dr. Frandsen was unquestionably related to the suppression of free expression. Dr. Frandsen was with several other nude people engaged in a political demonstration of which the deputies had notice. The deputies converged on the nude protesters in their military-style dune vehicles, raising the clear inference of planning and coordination in a manner calculated to intimidate and suppress a political assembly -- not in a manner required to cite a few (obviously) unarmed demonstrators for violating a local misdemeanor ordinance. This is strong evidence of the improper application of an Ordinance that is ostensibly intended to comply with the O'Brien requirement that the Ordinance not be related to the suppression of free expression.

Furthermore, the video tape admitted into evidence clearly shows the deputies abandoning the citation of another nude demonstrator in order to arrest Dr. Frandsen when Dr. Frandsen resumed his performance and speech as a Biblical prophet denouncing the anti-nudity Ordinance. All of this reinforces the fact that the arrest was directly related to the suppression of the speech of Dr. Frandsen, although the arrest was made under the auspices of an Ordinance that is permitted to regulate only nudity that is not expressively combined with other modes of protected speech. Therefore, Dr. Frandsen's arrest was directly related to his speech in violation of O'Brien.

The arrest of Dr. Frandsen also fails the fourth prong of the O'Brien test, which requires that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the government's interest. Again, evidence

adduced at the motion hearing showed that the arrest of Dr. Frandsen did not further in any way the legitimate governmental interests, such as curbing negative secondary effects or public order and morality, that are stated in the Ordinance. To the contrary, the arrest actually countered the stated intent of the Ordinance not to suppress free speech and expression. See Exemptions 6(b) and 6(c). Furthermore, the evidence is clear and unrefuted that Dr. Frandsen's dramatization/demonstration was exceedingly orderly and moral. Here, then, an arrest and conviction for expressive public nudity which is not contrary to the Ordinance's stated findings and intent cannot be considered to further an important or substantial governmental interest, and cannot be essential to the furtherance of that interest. In fact, the evidence shows that the Ordinance was applied precisely with the goal of suppressing Dr. Frandsen's assertive speech. Therefore, certiorari should be granted as the lower courts misstate the O'Brien test as applied to Dr. Frandsen's nudity.

CONCLUSION

A decision by this Court on whether an ordinance prohibiting public nudity is overbroad and vague where the ordinance requires interpretations of certain qualifiers, commerciality, and "existing judicial decisions"; whether prohibiting nudity in places of religious worship is unconstitutional; whether the State has the burden of proof when prosecuting under this criminal ordinance; and whether Petitioner's nudity in a public park is protected as expressive conduct under the First Amendment; would give guidance to citizens, local governments, and law enforcement officials across the nation concerning how public nudity can be both protected and constitutionally regulated. Further proceedings in the lower courts are not needed to clarify the issues presented, as the facts are apparent from the video and other record evidence and are not materially disputed. Moreover, those desirous of utilizing expressive nudity in political and religious speech will remain chilled without resolution of these issues. Thus, these important questions of constitutional law are ready for resolution by this Court. For the above reasons, the petition for a writ of certiorari should be granted.

Mark E. Tietig
Trial Counsel

Edward C. Tietig
Counsel of Record

No.

IN THE

Supreme Court of the United States

October Term, 1998

DR. MARVIN FRANDSEN,

Petitioner

v.

STATE OF FLORIDA,

On Petition For Writ Of Certiorari
To The Fifth District Court of Appeals
for the State of Florida

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT

MARVIN FRANDSEN,

Petitioner,

v. Case No. 98-2611

STATE OF FLORIDA,

Respondent.
_____/

DATE: January 25, 1999

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF CERTIORARI, filed September 29, 1998, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Mark Tietig, Esq.
Mark R. Brown
Office of the Attorney General, Daytona Beach
Hon. Edward J. Richardson
Hon. Warren Burk
Hon. Edward M. Jackson

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

MARVIN FRANDSEN

Defendant/Appellant,

v.

STATE OF FLORIDA

Plaintiff/Appellee

_____/

APPELLATE DIVISION
CASE NO. 97-23494-ACA
TRIAL COURT CASE NO.
95-22547-COA

Decision filed:

Appeal from County Court

Mark E. Tietig, Esq.
6065 S.Tropical Trail
Merritt Island, FL. 32952
Attorney for Appellant/Defendant

Office of the State Attorney
Attorney for Plaintiff/Appellee

RICHARDSON, Edward J.,

Appellant was charged with violating the Brevard County Anti-Nudity Ordinance #95-21, which prohibits public nudity. Appellant filed a Motion to Dismiss the charge based upon the alleged unconstitutionality of the ordinance. In particular, the appellant contends that the subject Ordinance is unconstitutional, both facially and as applied in this case, and for vagueness and overbreadth. Further, and in the alternative, the appellant argues that his conduct was exempted from the prohibitions of the ordinance under sections 6(b) and (c) of the ordinance. The Trial Court denied the appellant's motion. Thereafter, the appellant pled nolo contendere to the violation, expressly reserving his right to appeal the denial of his motion. This Court has completed a de novo review of the record, including the video tape presented to the trial court in support of the appellant's motion.

It is undisputed that on September 9,1995, appellant was observed on Playalinda Beach, at the Canaveral National Seashore Park, in Brevard County, Florida. The appellant was wearing no clothing other than a hat and an arm band. The appellant was carrying a sign with protest messages and he was speaking to a group of people at the time of his arrest.

Statutes and ordinances normally are the beneficiaries of a presumption of constitutionality which the attacker must refute. However, where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. See, Heffner v. International Society for Krishna Consciousness. Inc.. et al 452 U.S. 640, 658,101, S. Court 2559, 69 L. Ed. 2d 298 (1981).

The First Amendment literally forbids the abridgment only "of speech". However, this protection has been expanded beyond the spoken or written word, to include some forms of expressive conduct.

In the instant case, the subject ordinance regulates conduct rather than "speech". Simply stated, it is illegal in Brevard County to be nude in a public place. However,the exemptions set forth in sections 6(b) and 6(c) of the Ordinance remove from its' prohibition expressive conduct that may be "sufficiently inbred with elements of communication to fall within the scope of the First and Fourteenth Amendments". See, Spence v. Washington, 418 U.S. 405, 409. 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). Since the subject Ordinance proscribes "conduct" rather than speech, this Court finds that the burden rests with the appellant to demonstrate the unconstitutionality of the Ordinance.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, it-is necessary for the Court to analyze whether the appellant had an intent to convey a particularized message and (whether) the likelihood was great that the message would be understood by those who viewed it. See U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
Nudity, in and of itself, is not activity protected by the First Amendment. See, South Florida Free Beaches v. City of Miami.

734 F. 2d 608 (11th Cir. 1984); Barnes v. Glenar Theatre. Inc., 501 U.S. 560, 571,111 S. Ct. 2456,2463,115 L. Ed. 2d 504(1991).

This Court cannot conclude as a matter of law that the appellant's conduct in going nude in public was sufficiently inbred with elements of communication to fall within the scope of protected expression under the First Amendment. Indeed the nudity added nothing to the message. Therefore, it cannot be said as a matter of law, that through the appellant's nudity it was likely that the viewers would understand the message. The Trial Court was correct in denying the appellant's motion to dismiss on this legal issue. Perhaps, had the appellant elected to go to trial, in lieu of a plea, a jury question would have been created as to whether his conduct fell within the exemptions of the ordinance. The Trial Court's ruling of course, was confined only to questions of law. See, Texas v. Johnson 491 U.S. 397,109 S. Ct. 2533,105 L. Ed. 2d 342 (1989). As long as the ordinance was (1) within the constitutional power of the government; (2) it furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the government interest was unrelated to the expression of free expression; and (4) the incidental restriction of alleged First Amendment freedom was not greater than essential to the furtherance of the government interest, the legislation will be upheld. U.S. v. O'Brien, supra. This Court finds that the subject Ordinance meets this test, and is therefore, constitutional on its' face and as applied in this case. See,; Cafe 207. Inc.. v. St. John's County, 856 F. Supp.64 (M.D. Fla.1994), aff. 66 F. 3d 273(11th Cir. 1995), cert. den. 116 S. Ct. 1544, 134 L. Ed 2d 647(1996).

The Brevard County Ordinance serves several important and substantial government interests, including the protection of Order and morality. The Ordinance was enacted as an exercise of the Court's police power. The subject Ordinance in no way prohibits the appellant from expressing his views in a public forum. Each of the appellant's stated messages can be effectively communicated to anyone willing to listen without resorting to public nudity. The same constitution that guarantees a right of free speech also provides for a representative form of government that will pass laws consistent with the Constitution and will of the people. The people of Brevard County, speaking through their elected officials have said that public nudity is not an acceptable form of conduct. Keeping our public streets, parks and beaches free from naked people appears to be a goal that is consistent with the

protection of societal order and morality, as well as one that helps to assure public health and safety. If such law somehow restricts First Amendment freedoms, this Court finds that restriction to be incidental to the important governmental interest.

The appellant argues that even if the subject Ordinance applies to him, and is Constitutional when so applied, it is nevertheless unconstitutional and unenforceable because it is a criminal statute with broad implications capable of sweeping within its am bit protected speech or expression of those not before the court.

As to the overbreadth claim, the cases of Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2906, 37 L.Ed. 2d 830 (1973), and Geaneas v. Willets, 911 F.2d 579 (11th Cir.1990), cert. denied, 499 U.S. 955,111 S.Ct. 1431,113 L.Ed 2d 484 (1991) are controlling. In Broadrick, the Court noted that where conduct and not merely speech is involved, "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep". It is this Court's view that Brevard County Ordinance #95-21 is not substantially over broad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions may not be applied. d., at 615-16.

The appellant's conduct in the instant case, i.e. public nudity, is exactly what the ordinance is designed to prohibit. The "core concern" of Brevard County is to prohibit persons from being naked in public. In Geaneas, supra, the Court stated:

> The Plaintiffs conduct in the present case moreover rests extremely close to this core, whether or not the ordinance reaches to conduct at a distance from the core concerns. The plaintiffs clearly have no standing under Broadrick to challenge on this basis, the ordinance's application to them. The Plaintiffs overbreadth argument lacks foundation.

The appellant argues that the exemptions set forth in sections 6(b) and 6(c) of the ordinance are unconstitutionally vague. Such vagueness, it is argued, arises from the need to interpret the various words or qualifiers in section 6, which exempt

constitutionality protected expression from the scope of the ordinance.

It is clearly impossible to draft an ordinance that would embody all forms of expressive conduct that would be protected from governmental restriction under the First and Fourteenth Amendments. It is for this reason that Exemptions 6(b) and (c) are worded in rather broad terms. However, a review of these exemptions demonstrates clear language sufficient to put a person of common intelligence on notice of the proscribed and exempted conduct. See, Cafe 207, supra.

For the reasons stated, the decision of the Trial Court denying the appellant's Motion to Dismiss be and the same is hereby AFFIRMED.

Burk, Warren, Judge - concurs.
Jackson, Edward, Judge - recused.

IN THE COUNTY COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY,
FLORIDA

STATE OF FLORIDA,

CASE NUMBER 95-22547-COA

Plaintiff,

vs.

MARVIN VAUN FRANDSEN,

Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS

This cause came before the Court, and the Court having heard testimony, having considered the exhibits and Memorandums of Law submitted by counsel for the State and the Defense, and having heard oral argument from both counsel, does hereby enter its Order as follows:

The Court finds that Brevard County Ordinance 95-21, which prohibits nudity in Brevard County, is constitutional both on its face and as applied to the Defendant The ordinance is not unconstitutionally vague or overbroad. The ordinance does not violate the Defendants rights under the First Amendment or Fourteenth Amendment of the Constitution. More specifically, the conduct of the Defendant is not protected as free speech, political protest or freedom of religion; the ordinance does not act as a prior restraint and the enforcement of the ordinance is not in violation of the Defendant's due process or equal protection rights. Further, the Defendant's conduct is not protected under any exemption contained within the ordinance.

The Court relies on its review of all case law submitted, but especially on the cases of Barnes vs. Glenn Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct 2456(1991); United States vs. O'Brien, 391 U.S. 367,20 L.Ed.2d 672,88 S.Ct 1673 (1967) and Cafe 207, Inc. vs. St. John's County, 856 F.Supp. 641 (M.D. Fla. 1994), affirmed 66 F.3d 272(11th Cir. 1995), cert. denied 116

S.Ct. 1544, 134 L.ED.2D 647 (1996) as well as prior rulings from Brevard County Court Judges in State of Florida vs. Kristina Davis, 95-26139-COA, 95-25568-COA, and State of Florida vs. Erin Stillmayer, 95-22349-COA.

It is therefore, ORDERED and ADJUDGED that Defendant's Amended Motion to Dismiss for Unconstitutionality, Both Facially and as Applied, and for Vagueness and Overbreadth, is hereby DENIED on all grounds.DONE AND ORDERED at Viera, Brevard County, Florida, this 29 day of July, 1997, nunc pro tunc July 25, 1997.

/s/ Peter Haddad
HONORABLE PETER HADDAD
COUNTY COURT JUDGE

copies:

Michelle E. Jackson, Assistant State Attorney
Kyle P. King, Assistant County Attorney
Mark Tietig, Attorney for Defendant

BREVARD COUNTY ORDINANCE 95-21

AN ORDINANCE PROHIBITING PUBLIC NUDITY IN BREVARD COUNTY, FLORIDA; DESIGNATING A TITLE; EXPRESSING THE INTENT; SETTING FORTH FINDINGS; PROVIDING DEFINITIONS; CREATING EXEMPTIONS; PROVIDING FOR AN AREA EMBRACED; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA:

Section 1. Title. This ordinance shall be known as the "Brevard County Public Nudity Ordinance."

Section 2. Intent. It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Section 3. Findings.

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So.2d 1155,1156, n.3 [Fla. 1977]; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of

persons, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches V. City of Miami]; and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart for nudity has been found, by other communities in Florida, to have generally increased incidents of prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

m. Brevard County is a family oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular playalinda beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the Brevard County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v.

Glen Theatre. Inc. 111 S.Ct 2456,115 L.Ed.2d 504(1991]); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. Definitions.

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose,

1) the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a

dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) Years of age.

d. "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended or sleeping accommodations; or at the enclosed or isolated location of a bona fide private club whose membership as a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall

not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public Place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. Public Nudity. Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or

b. cause or permit another person to appear nude in a public place; or

c. sunbathe nude in a public place; or

d. appear nude in a public place in such a manner as to be in violation of §877.03, Florida Statutes; or

e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by §775.01, Florida Statutes.

Section 6. Exemptions. The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:

a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc_ _ U.S. 111 S.Ct. 2456,115 L.Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So. 2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or

d. where a person appears nude in any area which has been designated, by the Federal or State government as a public place provided or set apart for nudity; or

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. Violation of Section 5/Penalty. Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1) Florida Statutes.

Section 8. Severability. If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate purpose and intent of this ordinance.

Section 9. Area Embraced. This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Section 10. Effective Date. This ordinance shall take effect upon the date of receipt of official acknowledgement from the office of the Secretary of State of the State of Florida, that said ordinance has been filed with that office.

DONE, ORDERED AND ADOPTED in Regular Session, this 18th day of May, 1995.

ATTEST: BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA

/s/ Sandy Crawford
Sandy Crawford, Clerk

/s/ Nancy Higgs
Nancy Higgs, Chairman
As approved by the Board on
the 18th day of May ,1995.

STATE OF FLORIDA
COUNTY OF BREVARD
This is to certify that the foregoing is a
true and correct copy of Ordinance
95-21, witness my had

and official seal this 30th day of
May 1995.

SANDY CRAWFORD
Clerk Circuit Court
BY/s/Shirly Downs D.C.

Central Florida Naturists
P.O. Box 2004
Merritt Island, Florida 32954-2004

phone/fax
(407)381-0637

Sent by fax-Hard copy to follow

September 7, 1995

Sheriff Jake Miller
700 Park Avenue
Titusville, Florida 32780-4095

Dear Sheriff Miller:

In response to the recent decision to begin enforcement of the County Anti-Nudity Ordinance I would like to clarify the facts surrounding the actions taken by myself and Central Florida Naturists.

Originally a suit was filed by Plaintiff Marvin Frandsen with the hopes that innocent nude sunbathers would not be unlawfully cited or arrested under this unconstitutional ordinance. Just as we were preparing to start the deposition process, the plaintiff was involved in a serious automobile accident and was unable to continue as plaintiff. Acting in my capacity as President of CFN, I resumed the action as plaintiff and felt that due to the fact that this ordinance involved federal property and a number of civil rights violations occurring at said property, the issue would be better resolved in the federal courts. The suit was filed in Federal Court on August 14, 1995.

In light of the fact that the National Park Service are the administrators of Canaveral National Seashore, we continue to address this situation with NPS. A meeting has been set for September 12, 1995 with Harriet M. Deal of the NPS Regional Solicitors Office, myself and my attorney, David Wasserman, in Atlanta. I felt that meeting with the NPS before continuing actions in Federal Court would have resolved a great deal of the controversy, thus saving wasteful dollars being spent by both the naturist community and the Brevard County taxpayer. Simultaneously on September 12, 1995 a hearing concerning the Cafe 207 lawsuit will be heard in the 11th Circuit Court of Appeals in Atlanta. That case involves an ordinance very similar to that of

Brevard County. Both the meeting with NPS and the actions in the 207 case can drastically change the scope of the Brevard County Ordinance 95-21.

Your actions to enforce the ordinance at this time will only cause naturists to line up for their tickets, thus ultimately costing the county a great deal of taxpayers monies.

In response to the decision of the Brevard County Commission to instruct your office to begin enforcement of County Ordinance 95-21, CFN will continue to conduct a general political protest. As stated in our letter to you, dated May 19, 1995, our political protest movement is called the "N.U.D.E. Protest." N.U.D.E. stands for Naturists Unyielding Demand Equality.

N.U.D.E. Protesters shall use all legal means and modes of expression including nudity to express our protest message. However, N.U.D.E. Protesters are non-confrontational and will not engage in unlawful acts, only civil disobediences.

N.U.D.E. Protesters will often be protesting while fully or partially nude as an important part of our political protest message. Examples of the symbolic meaning of our nudity include but are not limited to:

* The N.U.D.E. Protest itself;
* The lack of virtue or intelligence in politicians who support anti-nudity legislation;
* A theatrical illustration of the harmless and positive value of the nude human body;
* A theatrical illustration of the inoffensive and positive value of nude recreation;
* Our place as heirs to the Prophet Isaiah in preaching repentance to a wicked and fallen government (see Isaiah 20:2-3).
* Other meanings as expressed by the individual protester and perceived by audience members.

Examples of the political slogans and messages which shall be combined with our nudity include but are not limited to:

* N.U.D.E. Protest of simply N.U.D.E.
* The Human Body Is Not A Crime

* Nude is not lewd
* Designate Nude Beaches

and so forth. Individual protesters may also fashion individual political messages as part of the N.U.D.E. Protest.

Please note that nudity when combined with hats, armbands, body writing and so forth bearing political messages is protected as speech under the First Amendment of the United States Constitution.

One example of this First Amendment protection is the decision of the Florida Supreme Court in McGuire v. State (12 June 1986), 489 So. 2d, 729 where it is stated:

Nudity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection. South Florida Free Beaches, 734 F. 2d at 610, Chapin v. Town of Southampton, 457 F. Supp 1170, 1174 (E.D.N.Y. 1978). See, e.g. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 1975).

Florida case law also provides numerous other examples where the right to protest nude has been upheld by the courts in spite of laws or regulations on the books prohibiting nudity. CFN will be happy to refer you to our legal counsel if further dialogue on this question is desired.

The N.U.D.E. Protest began on Earth Day, 22 April 1995 at the North end of Playalinda Beach. In time the N.U.D.E. Protest may spread to other Brevard parks and beaches. If Brevard County contains beach or park areas wherein free speech and the First Amendment are prohibited then please advise us as to where these areas are and we shall avoid them. Please also advise us if free speech as protected by the First Amendment is prohibited in public meetings of elected or appointed officials.

No time limit has been set for the N.U.D.E. Protest. CFN plans to continue this protest until the Brevard County ordinance is overturned and nude recreation areas have been adequately designated so as to meet public demand.

CFN wishes to remind all law enforcement officers that you are bound to uphold the law as defined in the courts. Any illegal

actions by law enforcement against N.U.D.E. Protesters will be referred to our attorney for immediate action. This action could include civil rights suits against law enforcement officers personally and the law enforcement agency collectively.

CFN also requests that the applicable law enforcement agency supply alternate protection for N.U.D.E. Protesters. It is unfortunate fact that some Americans do not understand or value our Constitution and may react in an inappropriate manner to our N.U.D.E. Protest.

In light of the fact that Oral argument is scheduled in the next week on the Cafe 207 case, the prudent course of action would be for your continued patience.

Sincerely,

/s/ Frank Cervasio
Frank Cervasio
President
Central Florida Naturists

cc by fax only:
David Wasserman, Attorney
Superintendent Wendell Simpson, Canaveral National Seashore
AANR
TNS/NAC
SSFB
Florida Today
Orlando Sentinel
Miami Herald
Associated Press
WTKS FM 104.1
CNN - Miami/Atlanta
WESH - TV 2
WCPX - TV 6
WFTV - TV 9
WKCF - TV 18
WMFE - TV 24
WOFL - Fox 35
National Public Radio
WMFE - FM 90.7
WJRR - FM 101.1

WLOQ - FM 103.1
WOMX - FM 105.1
WA1A - FM 107.1
WMGF - FM 107.7
WHKR - FM 102.7
WDBO AM 580
WGGD AM 1240
WMEL AM 920

IN THE COUNTY COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NUMBER: 95-22547-COA

STATE OF FLORIDA,

Plaintiff,

vs.

MARVIN VAUN FRANDSEN,

Defendant.
_____/

TRANSCRIPT OF HEARING

The transcript of the tape recorded proceedings, Tape #97-951, Log 3132, taken at the hearing held in the above-styled cause, at the Brevard County Courthouse, Viera, Florida, on the twenty-fifth day of July, 1997, before the Honorable Peter Haddad.

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APPEARANCES

KYLE KING, ESQUIRE
MICHELLE JACKSON, ESQUIRE
Office of the State Attorney
700 South Park Avenue
Titusville, Florida 32780
Appearing for State

MARK E. TIETIG, ESQUIRE
Tietig & Tietig
6065 South Tropical Trail
Merritt Island, Florida 32952-7124
Appearing for Defense

* * * * *

Thereupon:

THE COURT: I guess Frandsen is first.

MR. TIETIG: Yes, sir. Your Honor, this is a case of Marvin Frandsen being arrested for his nude expression, which was an integral part of his political protest and a theatrical demonstration.

And the protest, the County will agree that the, that nudity can, that nudity can be exempted under the Ordinance if it is part of an expression of, if it's part of an expression that is otherwise protected under the First Amendment.

And the Supreme Court, the U.S. Supreme Court in Texas v. Johnson set out a very simple test, very lenient test to determine whether or not the particular conduct is imbued with expression to the point where it would be protected by the First Amendment. And that test is: One, was there an intention to convey a particular message by the conduct. And then the second prong of the test is whether or not there was a likelihood that that message could be perceived.

And in that, you know, then the Court went on to cite many instances of where that, that sort of test has been met such as the wearing of black armbands in Sinker (phonetic), the burning of the flag in various cases, attaching peace symbols to the flag, sit-ins by blacks at lunch counters restricted to whites, and all other forms of conduct that the Government has, has maintained was illegal.

The nudity itself has been recognized by the Court, explicitly recognized as having the potential of, potential of expressiveness indeed protected by the First Amendment, and in fact the Ordinance seems to exempt it.

We have an argument with the vagueness and overbreadth of the exemption and the Ordinance itself, but it seems to very clearly exempt nudity which is part of an expression that is protected by the First Amendment.

And the County goes on to say that Dr. Frandsen could have done it a different way, though that's not the Government's call as to whether or not he did it in a way that they like the most or they thought might be the most effective. That's clearly up to the speaker

and, and even the speaker's audience.

And then the other point is that they seem to indicate that political speech does not have the same, or maybe it most always the same degree of protection afforded to adult entertainment and nude dancing. And the Supreme Court over and over and over again and everywhere from Cafe 207 to Barnes to, to Texas v. Johnson down to Young v. American Mini-Theaters has said that political expression is probably the most central, the most, afforded the highest degree of protection of any kind of speech that there is.

THE COURT: Well, doesn't 207 support the State's position of --

MR. TIETIG: No, Your Honor. Cafe 207 deals with, with adult entertainment and the Court and also the plurality in the Barnes Court seems to afford nude dancing, entertainment-type dancing, just a modicum of First Amendment protection.

But they go on to say themselves that in other contexts, such as political speech, that, and certainly again they say also serious literary works, that type of thing, then it

would be afforded the highest degree of protection.

THE COURT: Why don't we take each concept separately and then -- does that -- and then the State may argue and then I'll try to decide.

You know, the -- I wanted to let you know that I appreciate all of the help that both Counsel have given me to understand the issues in the case. The memorandums are excellent and I received voluminous copies of cases from both sides. I don't really know whose cases I was reading, but I read a considerable number of cases and I want to thank Counsel for assisting me on it.

Does the State want to argue that issue?

MR. KING: We'll just make a few comments, Your Honor. I think that as you so aptly put it, the briefs have adequately briefed the issues and I think you have all the material you need to decide, but I think their first argument that they thought was in one of the exemptions of the Ordinance, I don't think I have seen, and I don't think a case has been produced that stands to the proposition that

Government cannot Constitutionally prohibit nudity on a public beach, even where confined to some mode of expression.

As Counsel stated, there is First Amendment protection for nudity when involved in serious literary art form such as a production like Hair, Calcutta, or (inaudible word), or in the, or limited, very limited other peripheral First Amendment protection for nude barroom dancing. But there is no case for nudity outside at a public beach where the public, not, not in any closed structure, will pay to go in and see that type of activity, but in a public, open area.

So we don't think they fall into the exemption for, for those reasons and our brief states that.

MR. TIETIG: Your Honor, do you want me to respond at this time?

THE COURT: You, both of you have submitted a very extensive memorandum, which I utilized to guide me through and I don't know that we need to recite the memorandum arguments on the record, but if you had something I feel, you feel I must hear, please do. Please do.

MR. TIETIG: Well, yes, sir. The State throughout its argument seems to confuse public forum with anything less. Unrestricted public forum or a non-public forum. And beaches and parks and streets and forests are, are the quintessential public forum.

THE COURT: All right. The first thing I'll do is I'll rule that this Statute is in fact a nudity thing, an anti-nudity Statute. It's not a restraint. It's not intended as a restraint on Freedom of Speech, but it is a nudity Statute.

And we have Judge Fougerousse and Judge Friedland have already ruled on the Constitutionality of the Statute itself.

MR. TIETIG: Well, may I --

THE COURT: You certainly may. Yes, I'm directing my remarks to you, yes.

MR. TIETIG: Well, the, those arguments don't seem to take into account the very specific language of -- well, I should say the very unspecific language that we're talking about in, in the Exemption 6B, which are those qualifiers that we talked about. And also they don't address the question of 6C at all, which,

you know, refers the readers of Statute to whatever case law may exist somewhere in space and time.

And you know, the briefs, you know, does address that very comprehensively, I think.

Your Honor, the test -- one thing that we did not brief explicitly was this test I'm talking about, whether or not content is present and expressed in conduct, whether it is communicated, a communicative element to it. And that test is very straightforward and simple and the, the exemption seems to put a very ambiguous and very different test and, and possibly an even higher threshold than the Constitution would allow by saying, you know, incidental to and necessary for is not the same test that's in, in Johnson v. Texas, which is merely that the, the community, the actor intend that conduct to be expressive with a particularized message and there's an possibility it might be perceived as such.

THE COURT: Any argument on 6B? I mean, I agree, I think -- I don't think either case, either County Court case discussed 6B.

I think I'm going to have some trouble

keeping track of all of them.

MR. TIETIG: Your Honor, it might be helpful at this time to place Dr. Frandsen on the stand and play his, about a one or two-minute video of the demonstration immediately before and including at time of arrest so, so you can see exactly the, the heavily-imbued political content of, of the demonstration and the theatrical aspects of it and how the nudity was clearly an integral part of that demonstration.

THE COURT: I don't see 6B as being vague.

MR. KING: I'm sorry, Your Honor, I didn't --

THE COURT: I don't see it as being vague.

MR. KING: Vague? We agree, Your Honor.

THE COURT: Well, I knew you would.

MR. TIETIG: Yeah, that's --

THE COURT: I was remarking for both Counsel my thoughts on this matter.

MR. TIETIG: Well, Your Honor, when it says bona fide, that just leaves too much discretion in the part of law enforcement and has no guideline for the public to understand what the Government means by bona fide when it

says "incidental to and necessary for."

Who, whose judgment call is that? That's way beyond the test. That's way outside the realm of the test that's, you know, that's proper for this type of analysis that's contained in Johnson v. Texas.

And when it goes on to say that it must be a, you know, a good faith -- well, it does say farther on that, yeah, genuine -- we briefed that about whether or not a person was sarcastic or whether or not they, yeah, didn't really need it. Who's to tell? I mean, that's just unbridled discretion. And in a First Amendment context, that's just not, not Constitutional.

THE COURT: The, the -- perhaps I should see the video at this point in time.

MS. JACKSON: (Inaudible words), Your Honor, originally provided to Mr. Frandsen for Discovery, a copy of the videotape taken by the Brevard County Sheriff's Office and I asked that --

THE COURT: Is that what I'll be dealing

--

MS. JACKSON: -- Mr. Tietig bring the tape

with him here today. He also provided to me this week, last week, a tape prepared by Mr. Frandsen, apparently an edited or different version of the same event.

I don't know which tape they plan to play, but I certainly would like the Court, if you're going to watch a video, I'm willing to stipulate to the tape that was provided for Discovery. If they want to supplement it with their additional tape, each tape is only a few minutes long. They're not very long.

THE COURT: Mr. Tietig, which tape will you be showing me?

MR. TIETIG: We just wanted to show just, just the one that Mr. Frandsen edited to show the parts relevant to his arrest.

THE COURT: I was thinking to play the other tape. You got both of -- Ms. Jackson, you have both?

MS. JACKSON: Yes, Your Honor.

THE COURT: It shouldn't take -- if it will just take a few minutes, let me see. Let's do that. I'll just watch both of them.

MR. TIETIG: Dr. Frandsen's first.

THE COURT: Yes.

(Off the record discussion.)

THE COURT: Why don't you put it flat up against the wall. I think you can see it pretty well from here. I don't need to have it close up. We'll just put it back up against the wall so everyone can see it. I think everyone can see it clearly from here.

MR. TIETIG: Your Honor, I propose that he, Dr. Frandsen be sworn in so he can narrate what is going on in --

THE COURT: All right.

MR. TIETIG: -- the tape.

THE COURT: Very good. All right, Mr. Frandsen, please stand and be sworn by the Clerk. Please come forward and be sworn, sir.

Thereupon:

MARVIN VAUN FRANDSEN,

the Defendant herein, having been duly sworn, was examined and testified on his oath as follows:

(Thereupon, the videotape was played, during which the following proceedings were had.)

THE COURT: Mr. Tietig will guide you through the, through the tap.

MR. TIETIG: Yes.

Your Honor, would you like me to introduce Dr. Frandsen for the record and lay a predicate for his competency --

THE COURT: That might be a good idea.

MR. TIETIG: All right.

THE COURT: Why don't you go ahead and do that. As far as I'm concerned, we can -- well, can we do it from there?

MS. JACKSON: We don't have any objection to him --

THE COURT: I have no objection to Mr. Tietig remaining at his place. Perhaps Dr. Frandsen should, should come to the, come to the witness stand so that we, we'll be sure we get everything on tape.

Please have a seat right up here, Mr. Frandsen.

(Thereupon, the Defendant was seated in the witness stand.)

THE COURT: Go ahead.

MR. TIETIG: Are you ready?

THE COURT: Go right ahead.

DIRECT EXAMINATION

BY MR. TIETIG:

Q State your full name, please.

A Marvin Vaun Frandsen.

Q Are you the arrestee in this case?

A Yes, I am.

Q All right. Can you please state for the record your educational and professional background, please?

A I have a doctorate in experimental physics, University of Illinois, 1988. I'm employed by the United States Air Force at the Air Force Technical Applications Center.

My area of expertise is electro-magnetic pulse phenomena, nuclear weapons. Our mission at AFTAC is to monitor nations' compliance with nuclear treaty, nuclear treaties.

Q All right, so you're actively involved and deeply committed to the defense of the Country?

A Absolutely.

Q And you spend a lot of time very carefully reading important legal documents?

THE COURT: I presume he would be a person of good will --

(Thereupon, there was a flaw in the audiotape, after which the following proceedings were had.)

THE COURT: -- something like -- I presume

he's, whether he's a citizen or a resident, he's a person of good will and that --

MR. TIETIG: I just wanted to show his, his commitment -- I'm getting around his commitment to the First Amendment, to family values and those are the things which the Ordinance seems to --

THE COURT: Is that evidence? How can that be evidence?

MR. TIETIG: All right.

THE COURT: I mean, if his attitude -- would that be an issue? Guide me if you will; I don't see that as an -- I presume that he's a person of good will and presume that -- well, what else can I presume?

But I mean, he's just a person who is doing this for his own reasons. I don't see that his character is an issue.

MR. TIETIG: All right.

THE COURT: But you go right ahead, Counsel.

MR. TIETIG: Okay.

(Thereupon, there was a flaw in the audiotape, after which the following proceedings were had.)

MR. TIETIG: -- Dr. Frandsen to narrate the, the video.

THE COURT: All right, go ahead.

MS. JACKSON: The video that I was provided a copy of speaks for itself, Judge. I don't think we need a narration by the Defendant.

THE COURT: Which can we do first? Ms. Jackson, which one are you going to show?

MS. JACKSON: Your Honor, we would like to show the one that Mr. Frandsen has first and then --

THE COURT: All right. For the purposes of the Hearing, I see no objection to Mr. Frandsen making remarks concerning the video.

MS. JACKSON: Okay, Your Honor.

THE COURT: Go right ahead.

MS. JACKSON: We stipulate this is the video from the ninth of September, 1995.

THE COURT: Yes. Mr. Tietig, Counsel, can you identify the video then?

MR. TIETIG: No, I can't, but Dr. Frandsen can.

THE COURT: All right, very good, very good.

Dr. Frandsen, what is this?

THE WITNESS: This is a video taken by Mr. Tom Pitton (phonetic) throughout the proceedings of our demonstration, and it shows the nature of the demonstration.

THE COURT: Okay. Go right ahead, yes.

THE WITNESS: We're marching down to the beach to protest the enforcement and the existence of the County's anti-nudity Ordinance with a variety of messages. We're carrying signs, walking down to show people our opposition and to communicate our various messages.

I'm holding a sign.

Various people held signs. Some people were nude; some people were not.

You can see Mr. Morris there; he is nude. He is also protesting.

Expressive apparel include hats, armbands, and signs.

Now you see the Sheriff's Deputies racing down the beach in several ATV's to surround the demonstration and force us to halt.

Now, they first lit upon Mr. Morris and began to arrest him. He was ordered to dress

and to be cited.

MS. JACKSON: For the record, I believe that's Mr. Frandsen on the right-hand side of the screen with his back to the Court.

I'd like the record to show that he's nude in this video and he's the one with the white hat holding the sign.

THE COURT: Is that yourself?

THE WITNESS: That is myself in the right-hand corner.

THE COURT: Okay.

THE WITNESS: I'm carrying a sign. I have a hat and I have an armband. We'll go into that in more detail.

THE COURT: All right, go right ahead.

THE WITNESS: Still arresting Mr. Morris at this point as you see this scene here.

I began to speak and to prophecies. The Officer immediately confronted me. He ordered me to cease and desist and to be dressed and to be cited.

Okay. If we could stop at this point or pause.

THE COURT: Is that the end of the tape?

THE WITNESS: No, that's not the end quite

yet.

(Thereupon, there was a pause in the showing of the videotape.)

THE WITNESS: I wanted to point out that I was wearing an armband which stated N.U.D.E.. That armband stood for Naturists Unyielding Demand Equality. I also spelled that out on the armband.

I was wearing a hat which stated N.U.D.E. as well. It also stated CFN Project Isaiah. I have the hat here to enter, if necessary.

I was wearing a sign which stated: Anti-Bigotry, the County Commission's New Clothes on the front and N.U.D.E. slogans and the meaning written out on the back of the sign.

Continue.

(Thereupon, the playing of the videotape was continued.)

THE WITNESS: If you could pause for a second.

(Thereupon, there was a pause in the showing of the videotape.)

THE WITNESS: Notice that, you will notice that here and in the future, that they completely forgot about Mr. Morris. Mr. Morris

was not cited. I was singled out because I began a speech as a part of my political protest to my fellow protesters, to the officers and to the audience.

Continue.

(Thereupon, the playing of the videotape was continued.)

MS. JACKSON: We object to the speculation on the reason on anyone's (inaudible word).

(Thereupon, the videotape was concluded.)

THE COURT: All right. This is just for purposes of the Hearing only.

Q (By Mr. Tietig) Mr. Frandsen, will you tell the Court what, what the communicative elements that you particularly intended to convey, in other words with your nudity, by expressing yourself with nudity?

A Yes, I had five different communicative elements which I intended to convey. First was to a theatrical illustration of the emperor, as in the Emperor's New Clothes, in that I was attempting to convey the bareness and the absolute transparency of the County Commission's recently-passed anti-bigotry resolution.

Second, I was concretely identifying the N.U.D.E. protest itself.

Third, I was, I was acting in a theatrical

sense as the Prophet Isaiah in that I wish to express a message of political repentance to the Nation for its incorrect political alignment, just as Isaiah was commanded by God to walk three years in front of man, woman, and child in Israel to protest and to communicate the Lord's disaffection with the Israelites' political alignment with Egypt rather than Babylon.

I was also -- back to the Emperor's New Clothes, I was also illustrating the lack of virtue, lack of competence, and the lack of intelligence in our local politicians who have embarked upon their anti-nudity crusade and their hypocritical anti-bigotry resolutions.

And last, I also in the Isaiah mode, I wished to, by implication to show that the nude human body is harmless and positive. There's nothing wrong with it or God would never have commanded Isaiah to prophecies to Israel in the nude if there was anything harmful or immoral about the human body.

All these messages were attempted to be conveyed by my protest.

Q Dr. Frandsen, can you testify to anything that, that led you to believe that those messages would be perceived as such?

A Yes. There was extensive consideration of this entire issue before my protest. I spent time in the law

library. I looked up a number of the cases cited in the Ordinance; I read what they had to say.

All of them seemed to say to me that nudity when combined with some mode of expression is protected by the First Amendment, is protected as speech.

Q No, I'm asking you a slightly different question.

A All right.

Q What I want to know is: Was there anything that led you to believe that your particular mode of expression, your nudity would convey messages? Did anybody tell you that, that they would perceive a message the way you intended it because of the nudity?

A Certainly. These protest messages were discussed - -

MS. JACKSON: Objection. We're talking about speculation now and hearsay, what somebody else said to him, what he thought because of what somebody else said to him.

THE COURT: I'll permit it. It's for purpose of the Hearing.

Go right ahead, sir.

THE WITNESS: Yes. We had had numerous discussions in Central Florida Naturists meetings, both general and officer. We had

discussed the entire issue. People understood what I was going to do. People understood the messages.

It was very clear to people. I think it's very clear.

Q (By Mr. Tietig) All right, Doctor Frandsen, did you -- the law requires that it must be, you know, be able to be understood by a person of normal intelligence. Normal IQ ranges somewhere between a hundred and a hundred and five. Is your IQ at least of that level?

A Yes, it is.

Q All right. Now, what, what other -- did you make any other preparations -- I think you started to talk about that, that led you to believe that you would be in compliance with the Ordinance and would not violate of its, of its proscriptions?

A Yes. As noted, I checked out the case law cited in the Ordinance and the case law cited by the case law. I also read the Ordinance. And in the Ordinance, 6B says that you cannot be Constitutionally prohibited if it's part of a, of a demonstration.

I was conducting a demonstration. I mean, what does the Ordinance mean if not that?

Also, for example, we had one member of our club contact an attorney in Palm Beach, Mr. Donnie

Murrell (phonetic), had an extension, extensive discussion on this very subject, and reported back to us that this was for real and we did have this right.

Q And for real meaning what?

A Meaning that nudity combined with some mode of expression which has First Amendment protection is in fact protected. And that's exactly what I proceeded to do.

Q What -- did you think that you might have been violating the, the letter or the spirit of the Ordinance, that as described in it's findings?

A No, I did not. I, I feel that I've been consistent with the findings and -- where they are true, and certainly consistent with the exemptions expressed in the Ordinance and with the Ordinance's intent not to regulate speech.

I was engaging in speech.

Q Can you go through them individually?

A Yes. May I retrieve the folders?

Q Well, what I'm particularly interested in is the adverse secondary effects that might have occurred because of your political protest.

MR. TIETIG: The Court, Your Honor, the Courts have mentioned that in the Barnes contents, in the contents of adult

entertainment as possibly being restrained because of adverse secondary effects and, and I would maintain as a matter of law that, you know, this would not be an element of Dr. Frandsen's protest, besides being, you know, explicitly exempted by, by 6B.

THE COURT: I don't see his testimony as, as necessary to determine whether or not the Statute is Constitutional. His motives would be an issue one hundred percent to a trior of the facts, wouldn't it, rather than to me, although -- in other words, he's presenting his defense to an accusation which he may do, but not necessarily now.

The issue of whether or not the Statute is Constitutional would --

MR. TIETIG: Well, we're also arguing --

THE COURT: -- that question then, whether he's guilty or not guilty would be determined by the trior of the facts.

The video was helpful because I could see he was nude. I mean, that was really the -- can the County regulate nudity when it overrides some types of expression and the answer is yes, they can do that.

MR. TIETIG: Yes. We can see that, Your Honor, except when it comes to certain, certain nudity which -- it cannot. And then the more serious it is, the more it gets away from conduct, the more expressive it is, and especially when it gets into the realm of political expression, that should be afforded the highest degree of protection. That along with, you know, serious literary and artistic.

At the other end of the spectrum is the entertainment, the erotic dancing, according to the Court.

We're also talking about the as apply Constitutionality of the Ordinance. You know, the faithful Constitutionality and as applies to, to Dr. Frandsen.

So his testimony may be relevant in that context.

THE COURT: I see the video only as relevant to the issue of Constitutionality, so that I can see what actually, what happened. I mean, that he was nude and he was doing what he considered to be political protest. I think that's obvious from the all the material that I have that that's what he thought he was doing,

from his point of view.

I don't need, don't need, I don't need to hear it from him so much as we know that's what you're presenting to us. He was making a political protest. I think that's all I need to know.

And the fact that I saw that in fact he was naked or nude or whatever you want to call it, during his protest, I see it as an issue whether the State can --

I think that, I see the issue as foreclosed. The two County Court cases have ruled on this very same issue, whether they can regulate nudity and then impinge or go into certain other areas and, and still be regulating nudity. And you have two County Court cases that say you can. You have the 207 case that says you can.

I see, from my point of view, I see -- well, O'Brien (phonetic), the test, it has the test, what is that under, Glenn (phonetic) Theater. I see Glenn Theater as very similar, even though it involved nude dancing. As other words, I see that as clear cut, that explains clearly that the State -- in this case the

County, which is a division of State --

MR. TIETIG: Yes, Your Honor, but all --

THE COURT: -- can regulate this (inaudible word) and impinge on some type of expression.

MR. TIETIG: Yes, sir; but, Your Honor, those cases do specifically make an exception for higher, what they consider higher forms of speech, and nudity related to that speech.

And in that context, political falls in that as well as serious literary and artistic nudity.

In Barnes v. Glenn Theater --

THE COURT: Yeah.

MR. TIETIG: Justice Sauder's concurrence which made it, which made it the majority, he cites to Young v. American Mini-Theater, where they specifically say that political is probably the highest form of expression. And also there are other Supreme Court cases which are cited in the briefs, you know, Meyer (phonetic) v. Grant and -- well, I can't remember some of the others right now, but they are cited over and over and over again. The political speech is the, is the most protected,

or should be the most protected form of speech. It's at the core of the First Amendment.

THE COURT: Well, do we have any other questions of Dr. Frandsen before he retakes his seat? Anything else that you feel that he should say to me that would be a part of your presentation?

MR. TIETIG: Well --

THE COURT: Any other questions by --

MR. TIETIG: Yeah, yeah. It's -- there's a question, under O'Brien, if it's was found that the Ordinance, which you have (inaudible words) ruled, is, you know, is aimed at conduct and then if there is some protected expression, some nudity, in this case nudity that's associated with political demonstration, theatrical demonstration, then the only regulation that can occur is time, place, and manner. You know, with the, the traditional public forum, strict scrutiny-type of analysis that's due to First Amendment issues.

THE COURT: Do you need any more testimony from Dr. Frandsen? He might as well take his seat if we're through.

MR. TIETIG: No, but what I was going to

say is there was nothing in his demonstration that would have affected any time, place and manner considerations of the County. They were just interested in the nudity of part of the contents of his demonstration, of his speech.

And that --

THE COURT: Go ahead.

Q So, Dr. Frandsen, do you have anything unknown -- I mean, did you violate any other section of the Ordinance that may, that might have impelled or compelled the County to, to restrict your time, place and manner of demonstration?

A No, there's no -- the exemptions listed in the Ordinance apply to all public places at all times. I was in compliance with the exemptions listed in the Ordinance. They specifically mention a public place is a public beach and a public beach park. And the the specifically exempt nudity as a part of speech in that location.

So I'm in compliance -- I feel that I was in compliance with the Ordinance.

MR. TIETIG: Okay. No further questions, Your Honor.

THE COURT: Cross exam?

MR. KING: We don't have any questions,

Your Honor.

THE COURT: Dr. Frandsen, you may retake your seat. Thank you.

(Thereupon, the Defendant left the witness stand.)

THE COURT: The demonstration could have ben done without the nudity.

MR. TIETIG: Well, Your Honor, that's been offered before by various governments as their, as their justification for arrest. But the Supreme Court has held over and over and over again that it's not the Government's call, that the only thing the Government can do is to see if it complies with the test in, in Texas v. Johnson, which is: Is a particularized message intended and if so, is there a possibility that message could be perceived.

And nudity has been recognized by the Court explicitly as having the potential for expressive content. And Dr. Frandsen, you know, maintains that it was necessary to his, to his message.

And he also offered testimony that other people thought that was, you know, that they would have perceived it as such as well.

Whether or not it was the best -- we have a case I'd like to give you, Spence v. State of Washington, where they talk about the --

THE COURT: You mean I don't have that case?

MR. TIETIG: No, that's the one case --

THE COURT: I have at least a hundred cases.

MR. TIETIG: Yes, sir; that's the only case that the Supreme Court has ever done that you don't have.

THE COURT: All right, sir, all right.

MS. JACKSON: (Inaudible comment.)

THE COURT: I want you to know that I have read many cases delivered to me by both Counsel and I, I've been reading them since I first saw Mr. Tietig on this case with Dr. Frandsen.

MR. TIETIG: Your Honor, this content analysis in Texas v. Johnson is so important, I printed out more copies, one for the Prosecutor, one for the Court.

THE COURT: Did I not get that one?

MR. TIETIG: Oh, you did. But we paperclipped this particular section because it is of such critical importance.

THE COURT: All right. I'll have to read that then.

I don't -- I skimmed all the cases. I read those thoroughly that I thought were on point, from my point of view of course, and, and I have those here with me, but I don't remember the Texas case.

But if I have it, I have it. Is that correct, sir? I do have it?

MR. TIETIG: Yes, sir; you were provided with that.

THE COURT: Very good. I have an entire box full in the other room.

MR. TIETIG: Page 8.

MS. JACKSON: (Inaudible comment.)

MR. TIETIG: Does he have a -- can you give him a copy with a paperclip? Oh, he doesn't -- okay.

THE COURT: So I didn't have it? Okay. I'll, I'll certainly read it.

MS. JACKSON: (Inaudible comments.)

MR. TIETIG: Page 4, Your Honor.

THE COURT: On Spence versus Washington?

MR. TIETIG: No, the --

THE COURT: Texas?

MR. TIETIG: The Texas v. Johnson case.

THE COURT: I don't seem to have that here with me.

MR. TIETIG: Yeah, we'll give you a copy here, Your Honor.

THE COURT: I don't have that here with me and I didn't bring the box of cases that we have in the other room, in my office. I did read that one. Wait a minute, this is it. I read this one. This is -- that might have been O'Brien I read.

What type of activity was this? What type of activity?

MR. TIETIG: This was a flag-burning case. This was the, in fact, Justice Brennan who passed away yesterday authored that opinion. But this case is pretty much the definitive case on expressive conduct in general.

THE COURT: All right. I'm sure I did read this because I remember the wording. It's also, I guess, in O'Brien, too.

MR. TIETIG: Yes, sir.

THE COURT: Oh, it is the same in O'Brien. That's what I'm -- I'm looking at where it is cited in O'Brien.

MR. TIETIG: Yes, sir. In Texas v. Johnson, they say the O'Brien test, if it is considered to be directed at conduct, then when it does get into a free speech issue, you can only do a time, place and manner restriction on it. And that's not the sort of restriction that was going on here, if you find that his method, the communicative, the nudity as a communicative test is set out there in Texas v. Johnson, which was that he intend a message by his nudity and could it have been perceived.

The Courts also say that if the nudity itself, by the nature of the importance that the County places on nudity, just goes to show that is evidence of potential communicative element and the Courts have also said that a mode of impact of expression of conduct is probative in deciding whether or not there's a communicative element to it.

THE COURT: Does the State have any response?

MR. KING: Well, it appears that they're offering, one of the things that they're offering did favor types (inaudible words) Your Honor, does somehow indicate that what we found

on the videotape was expressive conduct within the contours of Texas v. Johnson and therefore exempt under Brevard County Ordinance. And as we've indicated, whether or not it falls into an exemption may be a question later for a trior of fact in determining whether or not the Ordinance is Constitutional or not, I think you need to look to O'Brien, which you're already aware of, (inaudible words) if you look to O'Brien and then you look to the Cafe 207 case, which has already ruled on the Constitutionality of (inaudible word) exempt ordinance in terms of (inaudible words) and the First Amendment, on First Amendment grounds, and so we, we think that's where the focus needs to be.

MR. TIETIG: Well, Your Honor, I'd just like to respond by saying we're talking about as applied in this context and this is a political demonstration and a theatrical demonstration and Dr. Frandsen is very serious about this. This is not an erotic dance he was doing. It wasn't line dancing he was doing. There was no commercial or, or even profit motive in what he was doing.

I don't think the State seriously would contend that.

The, all of that goes to our, you know, back to your vagueness and overbreadth argument. That's another problem with this, the spacial Constitutionality.

But here, you know, if there was anything that, that anybody could do that would be protected by the exemption, you would think it would be nudity that would be an element of a political demonstration. That should be the highest and most protected form of exemption.

THE COURT: Do they do dance, line dancing in the nude? Really?

MR. TIETIG: Yes, Your Honor, in fact we'd like to introduce into evidence a letter from County Attorney Scott Knox, you know, assuring the nude line dancers that that is protected under the exemption.

THE COURT: I didn't know that. I've received a grand education on this case, too, in many ways, beyond the Constitutional Law cases aiding the Freedom of Speech.

MR. TIETIG: And of course, we --

THE COURT: And demonstrations.

MR. TIETIG: Yes, sir. And also we have, you know, we have advertisements of nude dancing clubs that could be entered into evidence as well, which are commercial establishments. We're not arguing that that should be restricted, either. We're just saying this is way above and beyond that in the universe of, of protected speech.

THE COURT: I really see the Statute as a Constitutional Statute and the State does have a right to regulate, or as it entered the Court in the cases in regulating nudity, the flag-burning case, I don't see any nudity in it.

The, that was considered Freedom of Speech, political.

I think that we have two County Court Statutes that grant the Statute Constitutional. I think O'Brien, that 207, Cafe 207 talks about, settles the issue of vagueness and overbreadth. The O'Brien, I see as a similar case to this, even though it involves dancing.

And then -- where the hell is it? -- my, my, I'm relying heavily on the two County Court cases, Cafe 207 and I think, O'Brien. Yes, it is O'Brien -- in my decision.

MR. KING: It's the O'Brien case that in that case the (inaudible words), Your Honor?

MR. TIETIG: Does -- Your Honor, both Cafe 207 and Barnes speak about political speech being of a higher, higher, more protected level than they had at bar in those cases.

THE COURT: It's Glenn Theater that I was thinking of that I feel -- yeah, it was Glenn Theater, not O'Brien. But O'Brien is recited in Glenn Theater.

I'll rule, I'll rule that the Statute is not Unconstitutional for any of the reasons raised in the Motion and I've recited, I've recited, Grant Theater is the case I've relied on and I've recited in the record those cases I feel I should rely heavily on in my decision. And I'll so rule.

I want to thank Counsel for all the assistance on this issue and I'll ask the State to draw an Order, Proposed Order for me.

MS. JACKSON: Yes, Your Honor.

MR. TIETIG: Thank you, Your Honor.

THE COURT: Very well. Very well done job. Very well done.

(Thereupon, these proceedings were

concluded.)

* * * * *

STATE OF FLORIDA)
COUNTY OF BREVARD)

The above and foregoing transcript, consisting of pages numbered 1 through 41, inclusive, is a true and correct typed transcript to the best of my ability and the clarity and legibility of the contents of the magnetic tape or tapes provided to this firm in the judicial proceedings identified at the beginning of the transcript.

Signed this 17th day of September, 1997, at Rockledge, Brevard County, Florida.

/s/ Gerard F. Ryan
GERARD F. RYAN, RPR
Official Court Reporter
Notary Public
My commission expires 4-26-98

Supreme Court, U.S.
FILED
MAY 28 1999
CLERK

No. 98-1726

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

DR. MARVIN FRANDSEN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, Brevard County, respectfully files its Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in this case as follows:

OPINIONS BELOW

The opinions of the Fifth District Court of Appeals of Florida, the Eighteenth Judicial Circuit Court of Appeals of Florida, and the County Court of Brevard County, Florida, are included in the Appendix herein as Exhibit "A", Exhibit "B" and Exhibit "C", respectively.

JURISDICTION TO REVIEW

As discussed below, the reasons for review specified in the Petition fail to meet the criteria for the Court to exercise its certiorari discretion as enunciated in Rule 10(a), (b) and (c), Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner questions the constitutionality of Brevard County Ordinance 95-21 (hereinafter "ordinance"). The full text of the ordinance is reproduced in the Appendix to Petitioner's Brief at page 9a.

STATEMENT OF THE CASE

Brevard County accepts as accurate Petitioner's statement of the procedural history of the case. Brevard County is unable to stipulate to Petitioner's version of the facts as set forth in various portions of his Brief, including his Statement of the Case. Brevard County respectfully requests that this Court rely on the record and to disregard the factual representations and/or characterizations which

are not supported by the record.[1]

It may be helpful to this Honorable Court to highlight the undisputed facts, which were relied upon by, and recited within the opinion of, the Eighteenth Judicial Circuit Court of Appeals of Florida as follows:

> It is undisputed that on September 9, 1995, appellant was observed on Playalinda Beach, at the Canaveral National Seashore Park, in Brevard County, Florida. The appellant was wearing no clothing other than a hat and an arm band. The appellant was carrying a sign with protest messages and he was speaking to a group of people at the time of his arrest.

See *Frandsen v. State*, Case No. 97-23494 ACA (Fla. 18th Cir. Ct. Sept. 28, 1998), Appendix, Exhibit "B", page 2b.

ARGUMENT FOR DENYING THE PETITION:

I. THE RULINGS OF THE LOWER COURTS IN THIS CASE ARE CONSISTENT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The lower courts' decisions are consistent with United States Supreme Court decisions regarding freedom of expression; and, Petitioner's actions did not fall within any exemption set forth in the ordinance.

Petitioner argues that his actions of "wearing no clothing

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[1] For example, the Petitioner volunteers (in the Argument section of his Brief, page 5) that the ordinance was "created and promulgated by the National Family Legal Foundation of Phoenix, Arizona, a religious right organization which has touted its goal of 1000 such ordinances in place by the year 2000." This statement, and the "statistics" which immediately follow, are not found in the record and contradict the reality that private organizations have no ability to promulgate public laws.

other than a hat and an armband" on a public beach while "carrying a sign with protest messages and . . . speaking to a group of people"[2] qualifies for an exemption under either section 6.b. or 6.c. of the Brevard County ordinance. However, each of those provisions in the ordinance apply only "when the conduct of being nude cannot constitutionally be prohibited by this ordinance. . ." Petitioner's argument fails because his conduct in appearing nude on a public beach *can* constitutionally be prohibited under the precedent established by this Honorable Court.

Local governments may prohibit public nudity whether or not it is combined with expressive activity otherwise protected by the First Amendment. *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 115 L. Ed.2d 504, 111 S. Ct. 2456 (1991). In *Barnes*, a plurality decision, the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed.2d 672, 88 S. Ct. 1673 (1967), was the common denominator among the justices voting to uphold the Indiana statute prohibiting public nudity as applied to nude dancing. The Court, at page 512, stated:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The Court found that regulating nudity in a public adult entertainment environment was not a violation of the First Amendment because (1) the legislation at issue was within the constitutional power of the government; (2) the legislation furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms was no greater than essential to

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[2] *Frandsen v. State*, Case No.97-23494-ACA (Fla. 18th Cir. Ct. Sept. 28, 1998), Appendix, Exhibit "B", page 2b.

the furtherance of the governmental interest.

In *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), *affirmed* 66 F.3d 273 (11th Cir. 1995), *cert. denied* 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996), a St. Johns County anti-nudity ordinance was upheld based on an analysis of the ordinance under the *O'Brien* four-part test employed in *Barnes*. The St. Johns County ordinance was used as a model for the Brevard County ordinance now in question. The district court found that the ordinance easily met the first three parts of the *O'Brien* test. As to the first part, the court simply said "The law (i.e., the ordinance), as an exercise of the county's police power, is clearly within its constitutional authority." *Cafe 207, Inc.* at 644. The court found that the ordinance served several substantial and important governmental interests, including the protection of order and morality, as well as the interest in combating the secondary effects of nudity. *Id.* The court held that those governmental interests are not related to the suppression of free speech as such. *Id.* Finally, the district court reviewed whether the incidental restriction on alleged First Amendment freedoms was no greater than essential to the furtherance of the governmental interests served by the ordinance. *Id* at 645. The court then concluded that the St. Johns County ordinance passed all four parts of the *O'Brien/Barnes* test and was therefore constitutional.

Similarly, Brevard County Ordinance 95-21 is constitutional under the above-described analysis. The ordinance was enacted as an exercise of the county's police power and within its constitutional authority. The ordinance serves several substantial and important governmental interests, which are found in the statement of intent in Section 2 of the ordinance which reads in part:

> It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or

intentionally appearing nude in a public place.[3]

Furthermore, these stated governmental interests are not related to the suppression of free speech, and the incidental restriction on First Amendment freedoms, if any, is no greater than essential to the furtherance of these interests.

As the lower court in this case so aptly stated:

> The Brevard County Ordinance serves several important and substantial government interests, including the protection of Order and morality. The Ordinance was enacted as an exercise of the County's police power . . . The same constitution that guarantees a right of free speech also provides for a representative form of government that will pass laws consistent with the Constitution and will of the people. The people of Brevard County, speaking through their elected officials have said that public nudity is not an acceptable form of conduct. Keeping our public streets, parks and beaches free from naked people appears to be a goal that is consistent with the protection of societal order and morality, as well as one that helps to assure public health and safety. If such law somehow restricts First Amendment freedoms, this Court finds that restriction to be incidental to the important governmental interest.

Frandsen v. State, Circuit Court No.: 97-23494-ACA (Fla. 18th Cir. Ct. September 28, 1998).

In *State v. Davis*, Case Nos. 95-26139 COA and 95-25568 COA (Fla. Brevard Cty. Ct. Jul. 17, 1996),[4] Judge Philip Fougerousse

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[3] Appendix to Petitioner's Brief, page 9a.

[4] Judge Fougerousse's ruling was affirmed *per curiam* by a three judge circuit court appellate panel in *Davis v. State*, Case No. 96-19741-ACA (Fla. 18th Cir. Ct. Sept. 11, 1997). Full text of the trial court's ruling

applied the *O'Brien* test and upheld the Brevard County ordinance as applied to facts nearly identical to those at bar, where the Defendant Davis was arrested for standing on a public right-of-way topless with protest messages painted on her body. The County Court's order analyzed the Brevard County ordinance under the four-part *O'Brien* test and made specific findings, to-wit: that the ordinance was enacted within the constitutional authority of the County and its police powers, that it furthers important or substantial governmental interests, that the government interest is not related to the suppression of free expression, and that the incidental restrictions on the First Amendment freedoms of the defendant are no greater than essential to the furtherance of the governmental interests. Accordingly, the court held that the ordinance was valid.

Judge Fougerousse then considered the defendant's contention that, the First Amendment exempted her from the prohibition against public nudity because her topless appearance on a public right-of-way was accompanied by political speech in the form of a protest message painted on her body. Citing to *Adderley v. State*, 385 U.S. 39, 17 L. Ed.2d 149, 87 S. Ct. 242, *reh. den.*, 385 U.S. 1020, 17 L. Ed.2d 559, 87 S. Ct. 698 (1966), the trial court rejected that argument. In *Adderley,* the defendants were convicted of trespassing in connection with a protest at a jail site. The protesters claimed that they had selected a specific area outside the jail to conduct a civil rights protest and that as long as they were peacefully demonstrating in that area, the State had no right to enforce trespass laws against them. In affirming the convictions, the court stated,

> ". . . [S]uch an argument has as its unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on . . . We reject it again."

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and circuit court's affirmance are found in Appendix, Exhibits "D" and "E", respectfully.

[citations omitted].

Adderley, 385 U.S. at 47-48. *See also, Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 92 L. Ed 2d 568, 106 S. Ct. 3172 (1986).

Likewise, in the case at bar, Petitioner would have a First Amendment right to make his views known and to verbally express them in any public forum, however, in view of the county ordinance prohibiting public nudity, he cannot express those views in public while nude. Just as the First Amendment provided no exemption from prosecution to the defendants in *Adderley* when they protested while violating trespass laws, the fact that Petitioner was expressing a political message does not cloak him with First Amendment protection while violating the ordinance prohibiting public nudity.

In a similar case, *Shetler v. State*, 681 So. 2d 730 (Fla. 2d DCA 1996), Florida's Second District Court of Appeal upheld the conviction of a hotdog vendor arrested for wearing a T-back bathing suit in violation of the Polk County anti-nudity ordinance. The court rejected defendant's First Amendment claim, found that her conduct was fit for government regulation and that First Amendment protection was minimal. Further, the court held that the county's interest in protecting and preserving the health, safety, welfare, and morals of its citizens would justify any intrusion upon constitutionally protected expression.

For all the forgoing reasons, Brevard County respectfully submits that the ruling's of the lower courts in this case are consistent with the decisions of this Court regarding freedom of expression.

B. The lower courts' decisions are consistent with the United States Supreme Court decisions regarding overbreadth.

Petitioner also argues that the lower court decisions were erroneous when they held that the ordinance was not overly broad. Specifically, Petitioner contends that two of the ordinance's exemptions, section 6.b. and section 6.c., are unconstitutionally vague and overbroad on their face.

In *Café 207, Inc., supra,* a similar overbreadth argument was

enunciated against the St. Johns County, Florida, ordinance, to wit: that the St. Johns ordinance was unconstitutionally overbroad because it banned nudity associated with protected, serious theatrical performances such as *Hair* and *Equus*. The *Café 207* court observed that two issues are presented by such a challenge: 1) does the defendant have standing to assert the legislation is overbroad and, if standing is established, 2) what is the appropriate standard to be applied to the merits of the overbreadth claim. *Café 207, Inc.*, supra at 647.

The First Amendment overbreadth doctrine is an exception to the rule that a person will not be heard to challenge a statute based on how the statute might be applied to other people. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16, 37 L. Ed.2d 830 (1973). The concern is that an overbroad law may "threaten others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Board of Airport Comm'rs v. Jews for Jesus*, Inc., 482 U.S. 569, 574, 107 S. Ct. 2568, 2572, 96 L.Ed.2d 500 (1987).

However, simply conceiving of a situation where the legislation would be unconstitutional as applied is not sufficient to succeed on an overbreadth claim. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 2126, 80 L.Ed.2d 772 (1984).

> "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort . . . [e]ven when first amendment rights are implicated, the impetus to apply the doctrine attenuates as the expression . . . moves from 'pure speech' toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws" (Emphasis added) *Broadrick, supra,* at 615, 93 S. Ct. at 2916.

Thus, for the overbreadth claim to be entertained in such a case, the excessive scope of the statute or ordinance being reviewed must not only be real but substantial, and "not subject to cure through case-by-case analysis and limiting judicial construction or partial invalidation." See , *Café 207, Inc.*, 856 F.Supp at 648.

In the *Café 207, Inc.*, overbreadth challenge, the court held that the plaintiff lacked standing under the principles of *Broadrick, supra* and *Geaneas v. Willets*, 911 F.2d 579 (11th Cir.1990), that the alleged overbreadth was not real or substantial, and that whatever overbreadth may exist may be cured through case-by-case analysis, limiting construction or, if necessary, partial invalidation. *Café 207, Inc.* at 649. The court explained that even if there had been overbreadth as alleged, the St. Johns exemption language (Section 7(b)(i) and (ii) of that ordinance) would "step in to safeguard the protected speech," such as the aforementioned theatrical performances. See also *SBC Enterprises, Inc., supra* (upholding anti-nudity ordinance against, *inter alia*, similar overbreadth and vagueness challenges where ordinance prohibited all nudity in public and apparently lacked the first amendment exemptions which are present in the St. Johns and Brevard County Ordinances).

As mentioned above, the St. Johns Ordinance (as well as the *Café 207* case itself) was a model for Brevard's anti-nudity ordinance. Therefore, it is no mistake that the subject exemptions of the St. Johns ordinance (Section 7(b)(i) and (ii)) and the exemption language questioned in the instant ordinance (Section 6(b) and (c)) are nearly identical. Brevard County Ordinance 95-21, Section 6. Exemptions, states in pertinent part:

> b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc. . . and Hoffman v. Carson . . . ; or

> c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions. . .

Additionally, just as in *Café 207, Inc.*, the Court has the added guidance from pertinent whereas clauses, such as:

> u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and
>
> v. this ordinance regulates conduct, not speech.

Just as the *Café 207* court found no real or substantial overbreadth (that could not await case-by-case analysis) in light of the exemptions and whereas clauses, Brevard County respectfully requests this Court to conclude similarly in the instant case. Petitioner Frandsen was, by his own admission, engaged in a political protest. Brevard County submits that Petitioner certainly was not "chilled" in the exercise of his First Amendment rights on September 9, 1995, the date of his arrest. Moreover the ordinance's exemptions and whereas clauses provide ample protection to safeguard protected speech and, therefore, not discourage the exercise of constitutionally protected rights. Brevard County respectfully submits that Petitioner does not have standing, nor does there exist real or substantial overbreadth, per *Café 207, Broadrick*, and *Geaneas, supra*.

Defendant also asserts that ordinance exemptions 6.b. and 6.c. are vague and overbroad. However, upon closer inspection it appears that Defendant's complaints are actually of the due process/vagueness genre (i.e., it is alleged that the language fails to provide adequate notice of the proscribed activity and/or leads to arbitrary or discriminatory enforcement); this is not to be confused with the first amendment overbreadth doctrine enunciated above. In any case, Brevard County submits that the overbreadth doctrine does

not apply to the same exemptions that, as the *Café 207* court put it, "step in to safeguard . . . protected speech."[5] It is difficult to follow the logic that the same language which is praised in *Café 207* as being protective of free speech and diminishing any overbreadth concerns, is also the cause of the opposite effect of "chilling" first amendment activity. The *Café 207* court analyzed and upheld the *entire* St. John's ordinance under the overbreadth principles of *Broadrick* and *Geaneas,* including the nearly identical exemption language questioned herein. Brevard County simply requests this Honorable Court to reach the only result consistent with precedent, logic and common sense and conclude that the lower courts were correct to find Petitioner Frandsen 1) had no standing to assert that the ordinance is overbroad; and that 2) there exists no real or substantial overbreadth with regard to the ordinance exemptions.

C. The lower courts' decisions are consistent with the United States Supreme Court decisions regarding vagueness.

Petitioner argues that the ordinance is facially vague and therefore unconstitutional under the Due Process clause of the Fourteenth Amendment. Brevard County asserts that the defendant lacks standing to even raise the issue of vagueness.

A person whose conduct clearly falls within the prohibition of the statute cannot reasonably be said to have been denied adequate notice of the proscribed conduct. *McKenney v. State,* 388 So.2d 1232,1234 (Fla. 1980) (*citing, Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("We find that the defendant in this case lacks standing to complain of lack of notice since the facts adduced at trial reveal conduct which manifestly falls within the ambit of the assignation statute. Mr. Whitley testified: 'I had seen her [the defendant] and I drove up and we just agreed to do what we did' [referring to the subsequent sexual act"]). In *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S. Ct 2440 (1976), this Court analyzed a City of Detroit zoning ordinance which

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[5] *Café 207, supra* at 648.

regulated adult movie theaters. This Court would not consider a vagueness challenge in the abstract and held that the Respondents, who operated adult movie theatres, did not have standing to assert vagueness where the ordinances were "unquestionably applicable" to the Respondents.

The conduct of Petitioner so clearly falls within the prohibitions of the ordinance that he cannot claim he lacked notice as to what conduct the ordinance proscribed. In this case, on September 9, 1995, the Petitioner was on a public beach wearing no clothing or items of coverage other than a hat on his head and an armband. This conduct is clearly and precisely proscribed by the ordinance which requires that the adult human male genitals and buttocks be covered. Thus, Petitioner has no standing to claim lack of notice, nor can he assert a charge of vagueness in the abstract. *Young* and *McKenny, supra*. Furthermore, Petitioner, who was protesting the ordinance, was informed by the deputies on the scene that he was in violation of the county ordinance and was subject to arrest if he remained nude. The defendant was put on specific notice that his conduct was unlawful, yet he chose to remain nude anyway. Defendant, therefore, has no standing to claim he lacked notice of what exposure is proscribed when his conduct is so blatantly within the ambit of the ordinance's prohibitions; nor does he have standing to allege vagueness in the abstract or on behalf of third parties. *McKenny, Young* and *Broadrick, supra.*

Even assuming that the Court finds that Petitioner has standing, Brevard County submits that the ordinance survives the vagueness test, a two-part analysis. First, the subject statute or ordinance must provide persons of common intelligence adequate notice as to the nature of the proscribed conduct. Second, the wording of the statute or ordinance may not be so imprecise as to invite arbitrary and discriminatory enforcement. *S.E. Fisheries v. Dept. of Nat. Resources*, 453 So.2d 1351 (Fla. 1984) (Supreme Court of Florida held that the term "fish trap" is not so vague that persons of common intelligence must guess at its meaning. The Court added that if the definition of "fish trap" were more precise, then the purpose of the statute could be easily circumvented.); *See also, City of Daytona Beach v. Del Percio*, 476 So.2d 197, 200 (Fla. 1985) (The fact that several interpretations of an ordinance may be possible does not render it void for vagueness, but when regulations "are set out in

terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, [there is no] sacrifice to the public interest.").

The language contained in exemptions 6(b) and 6(c) is clear and puts persons of common intelligence on notice of the proscribed conduct and it also draws a bright line for law enforcement, thereby eliminating any invitation of selective enforcement due to imprecise language. In *Café 207, supra* , the court analyzed a vagueness challenge against virtually the same exact exemption language questioned herein. The court reasoned at page 649:

> Merely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague. Case-by-case adjudication is required and will satisfy the due process requirements of the Fourteenth Amendment.

The *Café* court went on to explain that if this nudity exception is condemned for vagueness, then the obscenity laws[6] must also be unconstitutionally vague. The court then reiterated that, as with obscenity laws, a case by case analysis will satisfy due process. See also *Department of Legal Affairs v. Rogers*, 329 So.2d 257 (1976). In *Rogers*, the Supreme Court of Florida upheld, against a vagueness challenge, an act proscribing "unfair or deceptive" trade practices. The court also found that the act's language providing that "due consideration and great weight shall be given to the interpretations of the . . . federal courts" (relative to whether trade practices are "unfair" or "deceptive") was not an unconstitutional delegation of legislative authority, where the court interpreted the act to mean decisions already existing prior to enactment. *Id.* at 267. In exemption 6(c), the ordinance *sub judice* refers to "existing judicial decisions," thereby avoiding the need for judicial construction and

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[6] Under *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973) obscenity laws leave protection of First Amendment values to the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

avoiding any vagueness (or unconstitutional delegation of legislative authority) challenges per *Rogers*.

In addition to *Café 207, S.E. Fisheries, Rogers* and *Del Percio, supra,* consider the following sampling of cases, upheld under the charge of vagueness, which lack the clarity and precision of the language challenged herein: *See, Bell v. Cox*, 642 So.2d 1381 (Fla. 5th DCA 1994) (Statute awarding attorney's fees upon owner's "unreasonable refusal" was not unconstitutionally vague as language was sufficiently clear so that persons of common intelligence could understand its meaning); *McKenney v. State*, 388 So.2d 1232 (Fla. 1980) (Florida Supreme Court held that assignation statute — Section 796.07(3)(a), Fla. Stat. — making it illegal "to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation" was not unconstitutionally vague nor overbroad); *United States v. Hymans*, 463 F.2d 615 (10th Cir. 1972) (Court held the term "indecent conduct" is not unconstitutionally vague); *cf. Coates v. Cincinnati*, 402 U.S. 611, 29 L Ed.2d 214, 91 S.Ct. 1686 (1971) (Supreme Court found Cincinnati ordinance unconstitutionally vague where ordinance made it a criminal offense for three or more persons to assemble on a sidewalk "and there conduct themselves in a manner annoying to persons passing by.")

For all the foregoing reasons, Brevard County submits that the lower court decisions correctly held that the ordinance was not unconstitutionally vague.

CONCLUSION

Since the decision of the lower court is consistent with prior decisions of this Court, the Petition should be denied.

Respectfully submitted,

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APPENDIX EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT

MARVIN FRANDSEN,

Petitioner,

v. Case No. 98-2611

STATE OF FLORIDA,

Respondent.
_____/

DATE: January 25, 1999

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF CERTIORARI, filed September 29, 1998, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Mark Tietig, Esq.
Mark R. Brown
Office of the Attorney General, Daytona Beach
Hon. Edward J. Richardson
Hon. Warren Burk
Hon. Edward M. Jackson

APPENDIX EXHIBIT "B"

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

MARVIN FRANDSEN

Defendant/Appellant,

v.

STATE OF FLORIDA

Plaintiff/Appellee

_____/

APPELLATE DIVISION
CASE NO. 97-23494-ACA
TRIAL COURT CASE NO.
95-22547-COA

Decision filed:

Appeal from County Court

Mark E. Tietig, Esq.
6065 S. Tropical Trail
Merritt Island, FL. 32952
Attorney for Appellant/Defendant

Office of the State Attorney
Attorney for Plaintiff/Appellee

RICHARDSON, Edward J.,

Appellant was charged with violating the Brevard County Anti-Nudity Ordinance #95-21, which prohibits public nudity. Appellant filed a Motion to Dismiss the charge based upon the alleged unconstitutionality of the ordinance. In particular, the appellant contends that the subject Ordinance is unconstitutional, both facially and as applied in this case, and for vagueness and overbreadth. Further, and in the alternative, the appellant argues that his conduct was exempted from the prohibitions of the ordinance under sections 6(b) and (c) of the ordinance. The Trial Court denied

the appellant's motion. Thereafter, the appellant pled nolo contendere to the violation, expressly reserving his right to appeal the denial of his motion. This Court has completed a de novo review of the record, including the video tape presented to the trial court in support of the appellant's motion.

It is undisputed that on September 9, 1995, appellant was observed on Playalinda Beach, at the Canaveral National Seashore Park, in Brevard County, Florida. The appellant was wearing no clothing other than a hat and an arm band. The appellant was carrying a sign with protest messages and he was speaking to a group of people at the time of his arrest.

Statutes and ordinances normally are the beneficiaries of a presumption of constitutionality which the attacker must refute. However, where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. See, Hefffier v. International Society for Krishna Consciousness. Inc., et al 452 U.S. 640, 658, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

The First Amendment literally forbids the abridgment only "of speech". However, this protection has been expanded beyond the spoken or written word, to include some forms of expressive conduct.

In the instant case, the subject ordinance regulates conduct rather than "speech". Simply stated, it is illegal in Brevard County to be nude in a public place. However, the exemptions set forth in sections 6(b) and 6(c) of the Ordinance remove from its' prohibition expressive conduct that may be "sufficiently inbred with elements of communication to fall within the scope of the First and Fourteenth Amendments". See, Spence v. Washington, 418 U.S. 405, 409. 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since the subject Ordinance proscribes "conduct" rather than speech, this Court finds that the burden rests with the appellant to demonstrate the unconstitutionality of the Ordinance.

In deciding whether particular conduct possesses sufficient

communicative elements to bring the First Amendment into play, it is necessary for the Court to analyze whether the appellant had an intent to convey a particularized message and (whether) the likelihood was great that the message would be understood by those who viewed it. See U. S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed.2d 672 (1968).

Nudity, in and of itself, is not activity protected by the First Amendment. See, South Florida Free Beaches v. City of Miami. 734 F. 2d 608 (11th Cir. 1984); Barnes v. Glenar Theatre, Inc., 501 U.S. 560, 571, 111 S.Ct. 2456, 2463, 115 L. Ed.2d 504(1991).

This Court cannot conclude as a matter of law that the appellant's conduct in going nude in public was sufficiently inbred with elements of communication to fall within the scope of protected expression under the First Amendment. Indeed the nudity added nothing to the message. Therefore, it cannot be said as a matter of law, that through the appellant's nudity it was likely that the viewers would understand the message. The Trial Court was correct in denying the appellant's motion to dismiss on this legal issue. Perhaps, had the appellant elected to go to trial, in lieu of a plea, a jury question would have been created as to whether his conduct fell within the exemptions of the ordinance. The Trial Court's ruling of course, was confined only to questions of law. See, Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). As long as the ordinance was (1) within the constitutional power of the government; (2) it furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the government interest was unrelated to the expression of free expression; and (4) the incidental restriction of alleged First Amendment freedom was not greater than essential to the furtherance of the government interest, the legislation will be upheld. U.S. v. O'Brien, supra. This Court finds that the subject Ordinance meets this test, and is therefore, constitutional on its' face and as applied in this case. See,; Cafe 207, Inc., v. St. John's County, 856 F.Supp. 64 (M.D. Fla. 1994), aff. 66 F.3d 273 (11th Cir. 1995), cert. den. 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996).

The Brevard County Ordinance serves several important and

substantial government interests, including the protection of Order and morality. The Ordinance was enacted as an exercise of the County's police power. The subject Ordinance in no way prohibits the appellant from expressing his views in a public forum. Each of the appellant's stated messages can be effectively communicated to anyone willing to listen without resorting to public nudity. The same constitution that guarantees a right of free speech also provides for a representative form of government that will pass laws consistent with the Constitution and will of the people. The people of Brevard County, speaking through their elected officials have said that public nudity is not an acceptable form of conduct. Keeping our public streets, parks and beaches free from naked people appears to be a goal that is consistent with the protection of societal order and morality, as well as one that helps to assure public health and safety. If such law somehow restricts First Amendment freedoms, this Court finds that restriction to be incidental to the important governmental interest.

The appellant argues that even if the subject Ordinance applies to him, and is Constitutional when so applied, it is nevertheless unconstitutional and unenforceable because it is a criminal statute with broad implications capable of sweeping within its am bit protected speech or expression of those not before the court.

As to the overbreadth claim, the cases of Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2906, 37 L.Ed.2d 830 (1973), and Geaneas v. Willets, 911 F.2d 579 (11th Cir. 1990), cert. denied, 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed.2d 484 (1991) are controlling. In Broadrick, the Court noted that where conduct and not merely speech is involved, "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep". It is this Court's view that Brevard County Ordinance #95-21 is not substantially over broad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions may not be applied. d., at 615-16.

The appellant's conduct in the instant case, i.e. public nudity, is exactly what the ordinance 's designed to prohibit. The core

concern" of Brevard County is to prohibit persons from being naked in public. In Geaneas supra, the Court stated:

> The Plaintiffs conduct in the present case moreover rests extremely close to this core, whether or not the ordinance reaches to conduct at a distance from the core concerns. The plaintiffs clearly have no standing under Broadrick to challenge on this basis, the ordinance's application to them. The Plaintiffs overbreadth argument lacks foundation.

The appellant argues that the exemptions set forth in sections 6(b) and 6(c) of the ordinance are unconstitutionally vague. Such vagueness, it is argued, arises from the need to interpret the various words or qualifiers in section 6, which exempt constitutionality protected expression from the scope of the ordinance.

It is clearly impossible to draft an ordinance that would embody all forms of expressive conduct that would be protected from governmental restriction under the First and Fourteenth Amendments. It is for this reason that Exemptions 6(b) and (c) are worded in rather broad terms. However, a review of these exemptions demonstrates clear language sufficient to put a person of common intelligence on notice of the proscribed and exempted conduct. See, Cafe 207, supra.

For the reasons stated, the decision of the Trial Court denying the appellant's Motion to Dismiss be and the same is hereby AFFIRMED.

Burk, Warren, Judge - concurs.
Jackson, Edward, Judge - recused.

APPENDIX EXHIBIT "C"

IN THE COUNTY COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, CASE NUMBER 95-22547-COA

vs.

MARVIN VAUN FRANDSEN,
Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS

This cause came before the Court, and the Court having heard testimony, having considered the exhibits and Memorandums of Law submitted by counsel for the State and the Defense, and having heard oral argument from both counsel, does hereby enter its Order as follows:

The Court finds that Brevard County Ordinance 95-21, which prohibits nudity in Brevard County, is constitutional both on its face and as applied to the Defendant The ordinance is not unconstitutionally vague or overbroad. The ordinance does not violate the Defendants rights under the First Amendment or Fourteenth Amendment of the Constitution. More specifically, the conduct of the Defendant is not protected as free speech, political protest or freedom of religion; the ordinance does not act as a prior restraint and the enforcement of the ordinance is not in violation of the Defendant's due process or equal protection rights. Further, the Defendant's conduct is not protected under any exemption contained within the ordinance.

The Court relies on its review of all case law submitted, but especially on the cases of Barnes vs. Glenn Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct 2456 (1991); United States vs.

O'Brien, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct 1673 (1967) and Cafe 207, Inc. vs. St. John's County, 856 F.Supp. 641 (M.D. Fla. 1994), affirmed 66 F.3d 272 (11th Cir. 1995), cert. denied 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996) as well as prior rulings from Brevard County Court Judges in State of Florida vs. Kristina Davis, 95-26139-COA, 95-25568-COA, and State of Florida vs. Erin Stillmayer, 95-22349-COA.

It is therefore, ORDERED and ADJUDGED that Defendant's Amended Motion to Dismiss for Unconstitutionality, Both Facially and as Applied, and for Vagueness and Overbreadth, is hereby DENIED on all grounds. DONE AND ORDERED at Viera, Brevard County, Florida, this 29 day of July, 1997, nunc pro tunc July 25, 1997.

/s/ Peter Haddad
HONORABLE PETER HADDAD
COUNTY COURT JUDGE

copies:

Michelle E. Jackson, Assistant State Attorney
Kyle P. King, Assistant County Attorney
Mark Tietig, Attorney for Defendant

APPENDIX EXHIBIT "D"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 95-26139-MMA
95-25568-MMA

STATE OF FLORIDA

Plaintiff

vs.

KRISTINA DAWN DAVIS

Defendant

_____/

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

THIS CAUSE having come on to be heard on the Defendant's Motions to Dismiss Information in the above styled causes of action and that the Court having heard arguments of counsel on several occasions and further having been provided and taking into consideration the Defendant's Memorandum of Law dated June 3, 1996 along with the Memorandum of Law in Opposition to Defendant's Motion to Dismiss provided by the State on June 3, 1996 with Notice of Supplemental Authority filed by the State on June 6, 1996 and the Court being otherwise fully advised in the premises does hereby find the following:

The Defendant in filing her Motion to Dismiss has raised constitutional issues alleging the unconstitutionality of County Ordinance 95-21 as it relates to these causes of action. Specifically, the Defendant has raised first amendment issues including free speech, the right to protest and overbreath, has also raised a due process issue of vagueness in said ordinance along with two issues pertaining to the Defendant's right to equal protection and finally, an issue related to selective enforcement. In the Defendant's Memorandum of Law the Defendant has conceded the issue of selective enforcement and for current purposes waives that issue. The Defendant has further waived the issues of overbreath and vagueness. These issues, having been waived and will not be considered by this Court at this time.

The facts of this case are as follows:

On October 24, 1995 the Defendant was allegedly standing on the side of a public roadway located in Brevard County, Florida in a thong bikini bottom wearing only pasties over the areola and nipples of her breasts, the remaining portions of her breasts not being covered (Case No. 95-25568-MMA). On November 6, 1995 the Defendant was standing in the same area of a public roadway located in Brevard County, Florida wearing only a thong bikini bottom with no covering of any portion of her breasts. On her body were written and/or drawn sentiments against Brevard County Ordinance 95-21 which Ordinance is being herein challenged by the Defendant.

FIRST AMENDMENT

The first issue is weather [sic] the Defendant's conduct in exposing her breasts in protest of Ordinance 95-21 is protected speech and conduct under the First Amendment of the United States Constitution and Article I, Sections 4 and 5 of the Florida Constitution. The Defendant alleges that she was engaged in a political protest on November 6, 1995 when she was arrested for being in violation of said Ordinance.

Nudity in and of itself is not a constitutionally protected activity. McGuire v. State, 489 So. 2d 729 (Fla. 1986). "[P]ublic nudity does not convey any specific message, at most it is a medium by which a variety of messages may be conveyed. The medium of nudity is not a particular message, the medium is simply the medium." Craft v. Hodel, 683 F.Supp. 289, 292 (D. Mass. 1988). Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection. South Florida Free Beaches v. City of Miami, Florida, 734 F. 2d 608 (11th Cir. 1984).

In O'Brien v. United States, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), the Supreme Court has enunciated a test for determining the constitutionality of restrictions on symbolic speech or expressive conduct.

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 319 U.S. at 376, 377.

O'Brien has been used to uphold an anti-nudity Ordinance from St. Johns County, Florida. Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641 (M.D. Fla. 1994),

affirmed 66 F.3d 273 (11th Cir. 1995), cert. den. April 22, 1996. In Cafe 207, the owner and dancers of an adult entertainment establishment challenged St. Johns County's anti-nudity ordinance. One of the bases of the challenge was that the act of nude dancing is expressive conduct or symbolic speech and protected by the First Amendment against such an ordinance. The Court applying O'Brien found quickly that the first three elements of the test were met:

> The law, as an exercise of the County's police power, is clearly within its constitutional authority. It also serves a substantial and important governmental interest in protecting order and morality and in combating the secondary effects of nudity in adult entertainment establishments of the sort typified by the Plaintiff's Cafe Erotica. And, neither of those governmental interests is related to the suppression of free expression as such. Cafe 207 at 644.

The Court concluded that the incidental restriction on the First Amendment freedoms was no greater than was essential to the furtherance of the governmental interests served by the ordinance. The Court acknowledged that there was "a line in every case beyond which the lawmakers cannot go in requiring clothing or prohibiting exposure in some contexts" but that the St. Johns ordinance did not cross that line. Cafe 207 at 646.

It is this Court[']s ruling in applying the O'Brien test to Brevard County Ordinance 95-21 that:

1. The ordinance was enacted within the constitutional authority of the county and its police powers.

2. The ordinance furthers important or substantial governmental interests in protecting societal order

and morality and suppressing the adverse secondary effects that public nudity generates; and to protect and preserve the health, safety and welfare of people of Brevard County.

3. The governmental interest is not related to the suppression of free expression.

4. The incidental restriction on the First Amendment freedoms of the Defendant in this case are no greater than essential to the furtherance of governmental interests.

This Court rules that the conduct of the Defendant in this case, appearing nude from the waist up, to protest is not entitled to protection under the First Amendment.

The Defendant argues that because this was a political protest, the conduct of appearing nude in public should not be abridged. In Adderley v. State, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242, the Supreme Court held that convictions for trespass did not unconstitutionally deprive defendants of their rights to freedom of speech, press, assembly, or petition. The defendants in this case were protesting the arrest of other protesters and segregation. The protest was at the local jail in the driveway near the jail entrance. The defendant had argued that they had a constitutional right to stay on the property because the "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . ." Adderley, at 47. In response to this argument, the Court states:

> Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected.. . .We reject it again.

It is this Court[']s ruling that the Defendant in this case does not have the unrestricted right to do as she pleases, where she pleases in the name political protest.

EQUAL PROTECTION

The Second major issue which is addressed by the parties in this case is Equal Protection. The Defendant contends that Brevard County Ordinance 95-21 is unconstitutional on its face by creating two separate classifications which will be addressed independently.

Male v. Female

Gender based classifications are tested by an intermediate scrutiny test, whether the classification bears a substantial relationship to important governmental objectives. Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451 (1976). (See United States v. Biocic, 928 F.2d 112 (4th Cir. 1991); Eckel v. Davis, 51 Cal.App.3d 831, 124 Cal.Rptr. 685 (1975).

It is the defendant's position that these cases which have held that the classification between the male and the female breast is not a violation of equal protection have been based upon the:

> [I]mplicit. . .reasoning of all of these decisions is the underlying assumption that the female breast is sufficiently different from the male breast to justify the different standard applied to the public expose [sic] of each type of breast. However, it is also absolutely evident from the cases that this distinction takes on constitutional meaning only because of the courts' acceptance that traditional concepts of morality and concepts of public decency buttress the distinction. Without the moral/decency nexus there would be no rational basis to distinguish between the

public exposure of either type of breast.
Defendant's Memorandum of Law p. 13.

It is argued that there is no longer the support for the gender bases [sic] classifications. That societal views of women and concepts of public morality and decency have changed rendering these classifications and unconstitutional denial of equal protection. That argument is hereby rejected by this Court. In rejecting the above argument, the Court further rejects the ruling in People v. David, 585 N.Y.S.2d 149 (N.Y. 1991) wherein said Court found that "male and female breasts are physiologically similar except for lactation capability." David at 68.

Female v. Female breast feeding

The second classification which the Defendant challenges is the allowance in Brevard County Ordinance 95-21 for exposure of a female's breast in conjunction with breast feeding. The Defendant claims that in one instance the act of exposing a breast is criminalized but in another it is not.

A rational basis test would be applicable to an equal protection analysis as to this type of classification which does not involve a fundamental or constitutionally protected right. Does the ordinance bear a rational relationship to a legitimate governmental purpose?

The exemption for the exposure of a breast of a female breast feeding a child from the ordinance is in deference to Section 383.015, Fla. Stat. (1995) which allows for breast feeding in public.

The Defendant in this case contends that the exposure of the breast is the same and that the basis for not allowing the exposure still remains, that the exposure is morally offensive. And given the legislative approval of breast feeding in public, there is no longer a legitimate governmental interest in the distinction (i.e. the changing societal views and morality).

The State's position is that the intentional exposure of a breast is not the same as the exposure of a breast while breast feeding and that the legislature has considered the policy behind allowing breast feeding. It asks that the Court acknowledge that the classification is reasonable and that anything further by the court would be an "inappropriate infusion of judicial will upon the legislative body." Memorandum of Law in opposition to Defendant's Motion to Dismiss p. 14.

There appears to be no case law addressing the breast feeding aspect at applied to a nudity ordinance or statute. It is then left to this Court to make a determination as to whether Brevard County Ordinance 95-21 bears a rational relationship to a legitimate governmental purpose. This Court finds that the rational basis for this classification would be that the legislature has considered the merits to allowing breast feeding (nurturing and health of child, family values, etc.) and weighed them against the moral values of society and believed that breast feeding was a greater interest and that the offensiveness of exposing the breast was incidental to this interest, thereby carving out an exception for breast feeding.

Based upon the foregoing analysis it is hereby ORDERED and ADJUDGED that the Defendant's Motion's [sic] to Dismiss Information in case numbers 95-25568-MMA and 95-26139-MMA are hereby denied.

DONE and ORDERED in Melbourne, Brevard County, Florida, this 17th day of July, 1996.

//s// Philip Fougerousse
PHILIP FOUGEROUSSE
County Court Judge

APPENDIX EXHIBIT "E"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 96-19741-ACA

KRISTINA DAWN DAVIS,
Appellant,

vs.

STATE OF FLORIDA
Appellee.
_____/

Decision filed:

Appeal from Brevard County Court

Burton J. Green, Esq.
Attorney for Appellant

Michelle E. Jackson, Esq.
Assistant State Attorney
Attorney for Appellee

PER CURIAM.

This case is the result of an appeal from two lower criminal cases where the Appellant was charged with violations of Brevard County Ordinance 95-21 which prohibits appearing nude in a public place. The Appellant moved to dismiss both cases on Equal Protection and First

Amendment grounds. The motions were denied by the trial court. The Appellant then pled nolo contendere specifically reserving her right to appeal the denial of her motions to dismiss. This Court has jurisdiction.[1]

The Appellant is a hot-dog vendor operating a hot-dog cart by the side of the road. On one occasion she proceeded to sell hot-dogs wearing only a thong bikini bottom and pasties on her breasts. This is one of the two cases consolidated on appeal. On another occasion, the Appellant protested the anti-nudity ordinance, 95-21, by wearing only a thong bikini bottom and no top such that her breasts had no covering while standing and waiving at the side of the road. On her body, including her breasts, she had protest writings directly on her skin. In addition, she carried a sign of protest. In both cases she was arrested for violating the county anti-nudity ordinance. The Appellant argues that the exposure of her breasts as an act of political protest was constitutionally protected conduct under the First Amendment. The Appellant further argues that the anti-nudity ordinance violates equal protection both as applied to the male gender and as applied to nursing females who may legally expose a breast while feeding a child.

The Appellant does not dispute that she violated Ordinance 95-21. Rather she argues that her constitutional rights as presented outweigh any requirement to adhere to this ordinance. We disagree. Ruling only on the facts before this Court, we hold that the Appellant was not entitled "constitutionally" to violate the ordinance as part of her protest against the ordinance. First, the ordinance clearly withstands scrutiny under the four part test enunciated in United States v. O'Brien, 391 U.S. 367, 20 L.Ed2d 672, 88 S.Ct. 1673 (1968):

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[1]Rule 9.030(c)(1)(A), Fla. R. App. P.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S., 367 and 376.

In O'Brien the Court reiterated it's position that when "speech" and "nonspeech" elements are combined in the same course of conduct, an incidental limitation on First Amendment freedoms is justified if there is a "sufficiently important governmental interest" in regulating the "nonspeech" element. Id. See also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991); Cafe 207, Inc. v. St. Johns County, 66 F.2d 272 (11th Cir. 1995) (affirming the district court at 856 F.Supp. 641 (M.D. Fla. 1994)).

In Adderley v. State of Florida, 385 U.S. 39, 46, 17 L.Ed.2d 149, 87 S.Ct. 242, 246 (1966) the Court reaffirmed it's position against the view that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." In that case the Court held that protesters did not have the contitutional [sic] protection to trespass on the property of the county jail in a protest against prior arrests made on fellow college students.

Therefore the Appellant did not have the inherent right to break the very ordinance that she has a First Amendment right to protest. She could very well have demonstrated against and protested the ordinance by standing along side of the road with protest signs or posters without exposing her breast to the public. Based upon this holding,

this Court does not address the merits of the Appellant's Equal Protection arguments.

The trial court is AFFIRMED.

JACOBUS, Bruce W., and HOLCOMB, Charles M., JJ concur.

JOHNSTON, Lawrence V., specially concurs with opinion.

Johnston, Lawrence V., concurring.

Apparently nudity bothers some people.

The Brevard County Sheriff's Office arrested the Appellant on October 24, 1995 for appearing in public (selling hotdogs) on the side of U.S. Highway 1. On that date and at that location, she wore less clothing than required to keep from violating Brevard County Ordinance 95-21.

The cost of prosecution and appeal of this particular incident surely must outweigh the benefit to the fair citizens of Brevard in the short run. In the long run, it is the price we pay to contain members of our society within some moral or cultural boundary. Sadly, some people must need them. On one side of the boundary are the people who want things as they were, i.e., covered. On the other side of the boundary are the people who annoy the others. "Common decency" and "propriety" are not concepts given to universal understanding. It is only a shame that the boundary cannot be drawn in such a manner that all citizens in our community cannot agree to stand on the same side of it. Living in our society and running government is not a game. There should be no need to waste tax money on these endless battles.

The second part of this case deals with the Appellant's arrest on November 5. It is for this incident which I find no legal support of the Appellant's position. I find only a manipulative intent to lower the dignity of the concepts of freedom of speech and equal protection and to obtain publicity. Squandering our constitutional rights for

commercial benefit is ill-advised. There are more worthy projects for our citizens, our lawyers and our judges.